Supreme Court, U.S.
FILED

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NO. _____

UNITED STATES SUPREME COURT

OCTOBER 1994 TERM

AUBREY WATTERSON

Respondent

versus

MALLARD BAY DRILLING, INC., AND UNDERWRITERS OF MALLARD

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a violation of an Occupational Safety and Health Administration regulation constitute negligence per se under the Jones Act, 46 U.S.C.A. § 688, and Federal Employers Liability Act ("FELA"), 45 U.S.C.A. § 51 et seq., barring consideration of the employee's comparative negligence and allowing the employee to recover all of his damages although the employee was contributorily negligent?

2. Does general maritime law permit an award of pre-judgment interest from the date of judicial demand on items of future damage?

PARTIES TO THE PROCEEDING

Aubrey Watterson, Respondent

Mallard Bay Drilling, Inc. and its underwriters, Malcolm Walter Blair for and on behalf of M. W. Blair and others, as representative of Certain Underwriters at Lloyd's London and Phoenix Assurance Public Limited Company, Excess Insurance Company Limited, Yorkshire Insurance Company Limited, Sovereign Marine and General Insurance Company Limited, Yokio Marine and Fire Insurance Company (UK) Limited, Taisho Marine and Fire Insurance Company (UK) Limited, Storebrand Insurance Company (UK) Limited, Atlantic Mutual Insurance Company, Wausau Insurance Company (UK) Limited, Minster Insurance Company Limited, The Marine Insurance Company Limited, Orion Insurance Company Public Limited Company, Skandia U.K. Insurance Public Limited

Company, Yasuda Fire and Marine Insurance Company of Europe Limited, Norwich Union Fire Insurance Society Limited, Ocean Marine Insurance Company Limited, Sphere Drake Insurance Public Limited Company, Dai Tokyo Insurance Company (UK) Limited, Lombard Continental Insurance Public Limited Company, British and Foreign Marine Insurance Company Limited, London and Hull Maritime Insurance Company Limited, Scor (UK) Reinsurance Company Limited, English and American Insurance Company Limited, Switzerland UK Insurance Company Limited, Nippon Fire and Marine Insurance Company (Europe) Limited, Fuji International Insurance Company Limited, Northern Assurance Company Limited, Prudential Assurance Company Limited, Pearl Assurance Public Limited Company, Scottish Lion Assurance Company Limited, Alliance International Insurance Company Limited, Hansa Marine Insurance Company

(UK) Limited, Vesta (UK) Insurance Company Limited, Bishopsgate Insurance Company Limited, Threadneedle Insurance Company Limited, The Prudential Assurance Company Ltd. "Trust" A/C 'No. 2', Bishopsgate Insurance PLC, Phoenix Assurance PLC 'A' A/C, Terra Nova Insurance Company Ltd., Northern Assurance Company Ltd., 'No. 6' A/C, Uni-Polaris Insurance Company Ltd. 'T' A/C, Minster Insurance Company Ltd. '3' A/C, Chancellor Insurance Company Ltd., Sirins (U.K.) Ins. Co., Atlas Assurance Co., M.O.A.C. (No. 2) A/C, Riunione Adriatica di Sicurta, and Hafnia Ins. Co., Petitioners

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OPINIONS BELOW

Aubrey Watterson ("Watterson"), employed on an inland drill barge, was injured while attempting to jump off of a scaffold. Suit was filed by Watterson and his wife in 16th Judicial District Court, Iberia Parish, Louisiana, against Mallard Bay Drilling, Inc. and its underwriters (collectively "Mallard") under the Jones Act, 46 U.S.C.A. § 688, and general maritime law. After a bench trial, the district court found Watterson to have been 85% at fault, Mallard 15% at fault and damages of $498,508. Based on Watterson's 85% fault, damages of $74,726.20 were awarded against Mallard with judicial interest from the date of judicial demand. The judgment was rendered on March 29, 1993 (Oral Reasons for Ruling, Appendix at A-1; Judgment, Appendix at A-7).

Watterson filed a devolutive appeal to the Third Circuit Court of Appeal, State of Louisiana. Mallard answered the appeal requesting, in part, that the state appellate court reverse the district court's granting of prejudgment interest of future damages (Appendix at A-10). Finding that an alleged failure to secure scaffolding was a violation of OSHA, the state appellate court adopted the minority view that an OSHA violation constituted negligence per se under the Jones Act and therefore consideration of Watterson's comparative negligence was precluded. As a result, Mallard was cast with 100% fault. Prejudgment interest was awarded by the state appellate court on the items of future damages. The state appellate court's ruling was rendered on October 12, 1994 (Appendix at A-17).

Mallard filed an application for certiorari and review with the Louisiana Supreme Court. Assigned as error was the state appellate court's holding that an OSHA violation constituted negligence per se under the Jones Act and the awarding of prejudgment interest on items of future damage (Appendix at A-59). The application was denied on January 26, 1995 (Appendix at A-116). The Louisiana Supreme Court subsequently stayed the judgment pending Mallard's writ of certiorari to the United States Supreme Court (Appendix at A-117).

STATEMENT OF JURISDICTIONAL GROUNDS

Mallard seeks review of the judgment of the Third Circuit Court of Appeal, State of Louisiana, rendered on October 12, 1994 (Appendix at A-17). Mallard's petition for writ of certiorari or review was denied by the Louisiana Supreme Court on January 26, 1995 (Appendix at A-116).

The state court judgment involves substantial issues of federal law. This court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a).

STATUTES INVOLVED

46 U.S.C.A. § 688

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an actin for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U.S.C.A. § 53

> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

29 U.S.C.A. § 653(b)(4)

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities or employers and employees under any law with respect to injuries, diseases,

or death of employees arising out of, or in the course of, employment.

STATEMENT OF THE CASE

A. Facts

Aubry Watterson was hired in May 1990 by Mallard, a drilling contractor. He was an experienced hand having worked in the oil patch for over seven years. Watterson was assigned to Mallard Rig No. 27, an inland drill barge. Watterson had previously worked on the rig for two years when it was owned by another drilling contractor.

During October 1990, Rig 27 was on location for Texaco in Catfish Lake, within the territorial waters of Louisiana. Watterson, as a floorhand, worked seven days "on" and seven days "off". On October 23, 1990, Watterson and the rest of the crew arrived on the rig in order to begin their seven day hitch.

Shortly after beginning their tour (shift) at 6 a.m., Watterson and a fellow crew member, James Jones, were assigned to chip paint on the rig's substructure above the keyway deck. The keyway was located on the bottom deck of the rig, directly below the rig floor. The crews of Rig No. 27 had been chipping the substructure for several months. In order to chip the substructure above the keyway deck, an aluminum non-skid scaffold board was used. It was positioned between the crane motor deck and the shale shaker deck, approximately twelve feet above the keyway deck. There were different versions as to how the scaffold was positioned.[1] Everyone but Watterson testified that the crew members could step easily from the crane motor

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[1]Watterson had one version; James Jones, a floorhand, had a second version; and the toolpusher and drillers had a third version.

deck to the scaffold. The scaffold was erected in the typical fashion. No one had ever been injured while working on the scaffold.

After receiving instructions from the driller, Watterson and Jones left the rig floor. They walked down to the pipe rack and then from the pipe rack onto the crane motor deck. Watterson was wearing goggles and a safety harness. After stepping from the crane motor deck onto the non-skid aluminum scaffold board, he attached the cable on his safety harness to an overhead beam. While wearing his harness, it was impossible for him to fall off of the scaffold. Once on the scaffold board, Watterson decided that he wanted to wipe it off with rags. The rags were located in a room on the keyway deck. Watterson spotted a wooden ladder below him on the keyway deck. Instead of getting off the scaffold the same way he

got on, Watterson decided to take a short cut by climbing down onto the ladder. Although he had been instructed not to work on top of a ladder, he voluntarily chose to climb onto the top of the ladder. Watterson did not have the approval of his driller to climb onto the ladder. He had not been told to use the ladder nor had he seen anyone else use it. Nothing prevented Watterson from getting off the scaffold the same way he had gotten on.

The top of the ladder was approximately one foot from the scaffold board with the steps of the ladder facing away from the scaffold. The top of the ladder was one to two feet below the scaffold. Watterson did not bother to move the ladder closer to the scaffold before attempting his short cut.

In order to accomplish his risky maneuver, Watterson knelt down on the

edge of the scaffold while facing the crane motor deck. The ladder was behind him and to his right. He shimmied off of the scaffold and groped for the ladder with his right leg. At trial, Watterson testified:

> Q Then you got on your knees about right here?
> (Indicating)
>
> A Yes, sir.
>
> Q Sort of like you were praying?
>
> A Yes, sir.
>
> Q And you were facing the crane motor deck?
>
> A Yes, sir.
>
> Q And then at that point, the ladder was behind you, about a foot behind you?
>
> A Roughly, yes, sir.
>
> Q And you kind of shimmied to the edge of the scaffold on your knees?

A Well, I didn't slide down the -- rephrase it.

Q You kind of shimmied to where you got right on the edge of the scaffold with your knees.

A Yes, lowering myself.

Q And then in that position, you took your right knee off the scaffold and tried to grope for the ladder in order to put your foot onto the ladder?

A Yes, I was reaching for the ladder.

Not surprisingly, while trying to accomplish this maneuver, Watterson ended up falling onto the ladder and then down to the keyway deck. Although there are different versions as to how the scaffold was positioned, there is no dispute that Watterson voluntarily chose this short cut. His own expert admitted the following:

Q Now, there's no doubt that Mr. Watterson chose to use the short cut on his own?

A It's possible.

Q At your deposition, I asked you, Dr. Miller, didn't Mr. Watterson choose to take a short cut on his own and you told me yes.

A Yeah.

Q You're not changing your testimony?

A No, no. He attempted to go that way.

Watterson admitted that prior to the accident, the scaffold never moved or slid. While he was walking on it, the scaffold was sturdy. Likewise, he admitted there was nothing wrong with the ladder. Nor was there oil or grease on it.

B. Action of the District Court

The district court, applying the Jones Act and general maritime law, found Watterson to have been 85% at fault and Mallard 15% at fault for the accident.[2] Watterson was held to have acted unreasonably in attempting to jump down onto the ladder from the scaffold. The allocation of 15% fault to Mallard was based on the district court's finding that the scaffolding Watterson was climbing off of at the time of his accident had not been completely secured to prevent its movement, and that this was a proximate cause of the accident. However, the court also found that Watterson may have fallen even if the scaffold had been secured. The district court made no finding that either an OSHA

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[2]The Jones Act, 46 U.S.C.A. § 688, extends to seamen the provisions of the Federal Employers Liability Act ("FELA"), 45 U.S.C.A. § 51 et seq.

or Coast Guard regulation had been violated. Watterson was held to have sustained general damages of $250,000 and a past and future wage loss of $248,508. Based on Watterson's fault of 85%, he was awarded damages of $74,776.20 against Mallard with judicial interest from the date the suit was filed.

C. Action of the State Appellate Court

A devolutive appeal was filed with the state appellate court. Mallard answered the appeal asserting that the district court had improperly awarded prejudgment interest on the items of future damage (Appendix at A-54). Watterson asserted, among other things, that the district court had erred in not applying 45 U.S.C.A. § 53 and the Kernan[3] rule to bar contributory negligence on

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[3]See Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958).

the part of Watterson. Watterson claimed that Mallard's failure to completely secure the scaffolding violated a safety regulation and constituted negligence per se to bar contributory negligence. At first, Watterson contended that failure to secure the scaffolding violated a United States Coast Guard regulation. In subsequent briefs to the state appellate court, Watterson asserted that because he had been injured on an uninspected inland drill barge, for which Coast Guard regulations do not apply, the failure to secure the scaffolding was a violation of OSHA. Mallard contested, and continues to contest, the applicability of either OSHA or Coast Guard regulations.

After a hearing before a five-judge panel, the state appellate court acknowledged that the accident occurred while Watterson decided to take a short cut by jumping down from the scaffold

board. Regardless, the state appellate court held that Mallard's failure to secure the scaffolding was a violation of OSHA, that OSHA is a safety statute under FELA, and therefore under 45 U.S.C.A. § 53, consideration of Watterson's contributory negligence was precluded. The state appellate court modified the district court ruling, in part, by assigning 100% fault to Mallard.

D. Action of State Supreme Court

Mallard filed an application for writ of certiorari and review with the Louisiana Supreme Court. Assigned as error was the state appellate court's holding that an OSHA violation constituted negligence per se under the Jones Act and FELA and the awarding of prejudgment interest on items of future damage (Appendix at A-59). A divided Louisiana Supreme Court denied the writ

on January 27, 1995 (Appendix at A-116). The judgment was stayed pending Mallard's filing of a writ of certiorari to the United States Supreme Court (Appendix at A-117).

SUMMARY OF THE ARGUMENT

1. The violation of an OSHA regulation does not constitute negligence per se under FELA or Jones Act.

2. Award of prejudgment interest on items of future damages violates general maritime law.

ARGUMENT

1. A Violation of an OSHA Regulation Does Not Constitute Negligence Per Se

A. Majority View

The Jones Act, 46 U.S.C.A. § 688, extends the provisions of the Federal Employers Liability Act ("FELA"), 45 U.S.C.A. § 51 et seq., to negligence claims asserted by seamen against their employers. 45 U.S.C.A. § 53 of the FELA provides that if an employer is negligent per se, consideration of the employee's contributory negligence is barred and the employee is allowed to recover all of his damages even though he is contributorily negligent.

Relying on Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985), the state appellate court held that there was a violation of OSHA, the

violation constituted negligence per se and the contributory negligence of Watterson was barred under 45 U.S.C.A. § 53. As a result, Mallard was cast with 100% fault.

Even if, as the state appellate court determined, an OSHA regulation applied and was violated (both of which Mallard denies), such a violation does not constitute negligence per se. The majority, and better reasoned view, is that OSHA is not a safety statute under the FELA and a violation of an OSHA regulation does not constitute negligence per se.

The majority view was set forth in Ries v. National R.R. Passenger Corp., 960 F.2d 1156 (3rd Cir. 1992). The Ries court held that OSHA is not the type of "safety statute" which would give rise to negligence per se and bar contributory negligence under 45 U.S.C.A. §53. In

reaching this conclusion, Ries distinguished OSHA from safety statutes specifically aimed at the railroad industry, such as the Safety Appliance, Boiler Inspection, and Hours of Service Acts. The court observed:

> Railroad safety statutes such as the Safety Appliance and Boiler Inspection Acts do not occupy the same position *vis a vis* the FELA as does OSHA . . . Indeed, the Supreme Court has held that these two railroad safety statutes "are substantively if not in fact *amendments* to the Federal Employers' Liability Act." [citations omitted]. The same cannot be said about OSHA. Furthermore, the Safety Appliance, Boiler Inspection and Hours of Service acts are all phrased in terms of "it shall be unlawful," which is the usual phrasing of a statute establishing negligence per se. [citation omitted]. OSHA lacks this important wording.

Ries, 960 F.2d at 1156.

Further, as the court explained:

> Congress has established an elaborate system of administrative civil and criminal penalties for

> punishing OSHA violations in 29 U.S.C.A. §666 . . . Indeed, the purpose of OSHA is preventive rather than compensatory. B&B Insulation, Inc. v. Occupation Safety & Health Review Comm'n, 583 F.2d 1364, 1370-71 (5th Cir. 1978) . . . For this court to allow an OSHA violation to serve as the basis for a negligence per se suit under the FELA would create an implied private cause of action, and thus upset the congressional scheme for enforcing workplace safety through administrative penalties. We cannot say that the legislatively created sanctions for OSHA violations are insufficient and require judicial supplementation nor can we say that any useful purpose related to congressional policy goals would be served by tacking on yet another enforcement vehicle. [citation omitted].

Ries, 960 F.2d at 1164.

Similar to the regulations relied on by the plaintiff in Ries, the scaffolding regulations relied on by Watterson in this case are merely general workplace regulations, not specifically aimed at the maritime industry. As in Ries, the

OSHA regulations relied on by Watterson are not the type of "safety statute" giving rise to the bar of contributory negligence under 45 U.S.C.A. § 53.[4]

The Ries court further held that a violation of an OSHA regulation does not constitute negligence per se because Congress has mandated in 29 U.S.C.A. 653(b)(4) that OSHA shall not:

> . . . enlarge, diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of, employment.

Ries, 960 F.2d at 1162. If a violation of an OSHA regulation could constitute

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[4] The Ries court noted at page 1163, "Imposing negligence per se for all statutory violations would be quite draconian, and we doubt that Congress intended to punish railroad employers so severely when it enacted the FELA." Mallard submits imposing absolute liability on maritime employers for violations of such general workplace violations would be equally oppressive.

negligence per se and bar contributory negligence under the FELA, it would be almost axiomatic that the effect would be to "enlarge or diminish or affect the statutory duty or liability of the employer." Ries, 960 F.2d at p. 1162.

A majority of the courts that have confronted the issue are in accord with Ries. The Fourth and Sixth Circuits have held that an OSHA violation is not negligence per se.[5] Recently, the Ninth Circuit rejected Pratico and adopted the reasoning in Ries. Robertson v. Burlington Northern Railroad Company, 32

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[5] See, for example, Albrecht v Baltimore & Ohio R. Co., 808 F.2d 329, 332-33 (4th Cir. 1987) (OSHA violation did not constitute negligence per se); Minichello v U.S. Industries, Inc., 756 F.2d 26, 29 (6th Cir. 1985) (in product liability cases, "OSHA regulations can never provide a basis for liability because Congress has specified that they should not"). Martin v. Mapco Ammonia Pipeline, Inc., 866 F. Supp. 1304 (D. Kan. 1994); Bertholf v Burlington Northern R.R., 402 F. Supp. 171, 173 (E.D. Wash. 1975).

F.3d 408, 410 (9th Cir. 1994). Ries is also followed by a majority of state courts.[6]

B. Minority View

Rather than follow Ries, the state appellate court opted to follow Pratico. The reasoning of the court in Pratico has been described as defying "traditional principles of statutory interpretation which dictate that courts first look at

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[6]See, for example, Canape v. Colorado Compensation Insurance Authority, 878 P.2d 83 (Colorado Ct. Apps. 1994)("29 U.S.C. § 653(b)(4) precludes an instruction of negligence per se"); Brady v. Ralph M. Parsons Company, 327 Md 275, 609 A.2d 297 (Ct. of Apps. Md. 1992)(proof of violation of an OSHA standard, although admissible, does not establish negligence per se or preclude consideration of plaintiff's contributory negligence). See also Bachini v Burlington Northern R.R. Co., No. CV-87-248-GF, 1990 WL 359076 (D. Mont., March 7, 1990); Hebel v Conrail, 475 N.E. 2d 652 (Ind. 1985); Wendland v Ridgefield Constr. Services, Inc., 184 Conn. 173, 439 A. 2d 954 (1981) (all finding OSHA violation not to be negligence per se under the FELA).

the statute's language and the plain meaning of that language." Ries, 960 F.2d at p. 1161. Pratico's holding that an OSHA violation constitutes negligence per se and bars contributory negligence under FELA was based on that court's conclusion, triggered by an overly restrictive interpretation of a single letter by the then-solicitor of labor, that the only purpose of the "enlarge or diminish or affect" language of section 653(b)(4) was to ensure that OSHA did not create a private cause of action which would bypass workers' compensation. Ries, 960 F.2d at p. 1161. As stated in Ries:

> It defies reason to construe section 653(b)(4) as only precluding private actions which would bypass workers' compensation. Had Congress intended such a result, it would not have drafted section 653(b)(4) in such sweeping terms.

Ries, 960 F.2d at p. 1162. Mallard respectfully submits the Ries court's analysis is the proper view.

The Pratico court cited several earlier Fifth Circuit opinions, Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985); Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231 (5th Cir. 1982); Melerine v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1981); and Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980), for the proposition that the "Fifth Circuit . . . has consistently found § 653(b)(4) no obstacle applying the doctrine of negligence per se to OSHA violations." Pratico, 783 F.2d at 264-265. However, these cases do not support that conclusion.

Neither Dixon nor Rabon are Jones Act or FELA cases, but instead are

diversity actions.[7] In fact, Dixon simply held that admitting OSHA standards, even if erroneous, was harmless because the evidence was only cumulative. Likewise, Lowe was not a Jones Act or FELA case, but rather a diversity suit applying Alabama law. Further, the case did not even involve an OSHA statute, but rather a federal motor vehicle statute.[8]

Similarly, Melerine is not a Jones Act case, but instead arose under general maritime law, and in no fashion supports the Pratico court's holding. In fact,

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[7]Dixon arose under Mississippi law, while Rabon was brought under Florida law.

[8]Pratico cited Lowe for the proposition that admitting a federal statute as evidence of a standard of care in a state law case does not create a new cause of action. However, like Dixon and Rabon, Lowe does not support Pratico's holding that a violation of OSHA constitutes negligence per se to bar contributory negligence.

Judge Rubin opened his opinion in Melerine with the following statement:

> In a negligence action, regulations promulgated under the [OSHA] provide evidence of the standard of care exacted of employers, but they neither create an implied cause of action **nor establish negligence per se**. [Emphasis added]

Melerine, 659 F.2d at 707. Obviously, Melerine contradicts, rather than supports, the holding in Pratico.

Finally, in Rabon, while specifically declining to decide whether the alleged violation of an OSHA regulation constituted negligence per se, in dicta, the court stated that "the violation of an OSHA regulation is evidence of negligence, or in appropriate cases negligence per se." Rabon, 672 F.2d at 1238. The court cited Melerine, National Marine Services, Inc. v. Gulf Oil Co., 433 F. Supp. 913 , 919-920 (E.D. La. 1977), aff'd 608 F.2d 522 (5th Cir.

1979), and Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974) for this proposition. The latter part of this statement represents an erroneous reading of the cases relied on by the Rabon court. It contradicts Judge Rubin's specific statement on the issue in Melerine. Moreover, neither National Marine Services, Inc. nor Buhler held that a violation of OSHA constitutes negligence per se. Both cases simply held that OSHA regulations may, in appropriate cases, be considered as guides for determining standards of care in weighing a defendant's negligence, a view which Mallard does not dispute. Unfortunately, the Pratico court compounded the error by relying on the dicta from Rabon.

As noted in Pratico, "[T]he legislative history of [FELA] Section 53 indicates that Congress considered this

elimination of contributory negligence to simply be a reflection of the common law doctrine of negligence per se . . ." Pratico, 783 F.2d at 268. However, eliminating contributory negligence in the instant case based on the violation of an OSHA regulation does not reflect general maritime law. As Judge Rubin indicated in Melerine, under general maritime law, OSHA regulations do not establish negligence per se.

In light of the foregoing, the state appellate court's reliance on Pratico is misplaced. The holding of Ries represents the better-reasoned view. Not only does 29 U.S.C.A. § 693(b)(4) prohibit OSHA from being used to create new, private causes of action, it bars the use of the statute to enlarge or affect the rights of employees and the duties of employers under any law. If a violation of an OSHA regulation

constitutes negligence per se and bars contributory negligence under FELA, its effect would be to "enlarge or affect the statutory duty or liability of the employer." Ries, 960 F.2d at p. 1162. The view followed by the state appellate court violates 29 U.S.C.A. § 653(b)(4).

C. Plaintiff's Preemption Argument

Mallard anticipates that Watterson will attempt to diminish the holdings in Ries and Robertson by contending that they held that a violation of OSHA is not sufficient to constitute negligence per se because the Federal Railroad Association ("FRA") has preempted OSHA in matters of safety.[9] This argument is not

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[9]As noted above, in Robertson, the Ninth Circuit recently followed Ries, rather than Pratico, and held an OSHA violation does not constitute negligence per se. Like Ries, Robertson held that although OSHA standards may be admitted in a FELA case as evidence of the applicable standard of care, such evidence is to be considered only in relation to all other evidence in the

correct. The Ries court specifically found that OSHA had jurisdiction with regard to the stairway which was at issue, and that the violation could serve as the basis for administrative penalties against the defendant, Amtrak. Further, the court even allowed evidence of the violation to be admissible as evidence of Amtrak's negligence. However, in holding that an OSHA violation did not constitute negligence per se, the Ries court did not do so because of preemption by the FRA. Instead, as previously stated, the Ries holding was based on the determination that OSHA is not a safety statute for purposes of FELA, and Congress has mandated in 29 U.S.C.A. § 653(b)(4) that OSHA standards are not to be used to alter the rule of civil liability of employers.

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case.

The fallacy of the preemption argument is further illustrated by Watterson's reliance, in his argument to the state appellate court, on Templeton v. Chicago and Northwestern Transportation Co., 603 N.E. 2d 441 (Il. Sup. Ct. 1992). The Illinois Supreme Court specifically held that OSHA had not been preempted by the FRA. After this holding by the Illinois Supreme Court, on remand, the appellate court affirmed the trial court's judgment assigning 14% contributory negligence to the plaintiff. Templeton v. Chicago and Northwestern Transportation Company, 257 Ill. App. 3d 42, 628 N.E. 2d 442 (Il. 1993). Thus, Templeton demonstrates that whether or not OSHA has been preempted by the FRA has nothing to do with the majority view that a violation of an OSHA regulation does not amount to negligence per se.

D. Summary

Even if, as the state appellate court determined, an OSHA regulation applied and was violated (both of which Mallard denies), such a violation does not constitute negligence per se. OSHA is not a safety statute under FELA and a violation of an OSHA regulation does not constitute negligence per se to bar contributory negligence pursuant to 45 U.S.C.A. § 53 of FELA. To hold otherwise would be to violate the Congressional mandate in Section 653(b)(4) of OSHA that it not be used to "enlarge or diminish or affect" rights under statutory or common law. Allowing a violation of an OSHA regulation to constitute negligence per se would have just such an effect.

2. Prejudgment Interest

Under maritime law, the awarding of prejudgment interest is the rule rather

than the exception. Reeled Tubing, Inc. v. M/V Chad G, 794 F.2d 1026 (5th Cir. 1986). This general rule is limited by the proposition that a seaman may receive prejudgment interest on past but not future damages. Brister v. A.W.I., Inc., 946 F.2d 350 (5th Cir. 1991). Prejudgment interest may be recovered only on damages accrued as of the date of the judgment. Borges v. Our Lady of the Sea Corp., 935 F.2d 436 (1st Cir. 1991); Martin v. Walk, Haydel & Associates, Inc., 794 F.2d 209 (5th Cir. 1986); Valley Line Co. v. Ryan, 771 F.2d 366 (8th Cir. 1985); Hillier v. Southern Towing Co., 740 F.2d 583 (7th Cir. 1984), cert. denied, 469 U.S. 1190, 105 S.Ct. 961, 83 L.Ed.2d 966 (1985).

Mallard has been cast with prejudgment interest on items of future damage. Prejudgment interest was awarded on damages for future pain and suffering

and future wage loss. Such an award of prejudgment interest is contrary to established principles of maritime law.

CONCLUSION

By granting the application, the Court can resolve whether the violation of an OSHA regulation constitutes negligence per se under the Jones Act and FELA. The application involves substantive issues of Federal Law that should be decided by this Court.

Respectfully submitted,

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RUSSO & ZAUNBRECHER

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ATTORNEYS FOR MALLARD BAY DRILLING, INC. AND UNDERWRITERS OF MALLARD

AUBRY AND MARTY WATTERSON	*	**16TH JUDICIAL DISTRICT**
VERSUS	*	**NUMBER 72865**
	*	
MALLARD BAY DRILLING, INC.	*	**IBERIA PARISH, LOUISIANA**

* *

BY THE COURT:

One of the main factual contentions is the position, how the scaffold was positioned. I find that by a preponderance of the evidence that the scaffold extended from the crane motor deck to the pipe joints. That means that there was no unseaworthiness or negligence in providing access to the scaffolding.

With regard to the railing on the scaffold, Dr. Miller said the purpose of the railing was to prevent inadvertent falling from the scaffold. So the lack of the railing was not a proximate cause of

this accident since Mr. Watterson was intentionally attempting to leave the scaffold, he didn't inadvertently step off the edge. I find that the presence of the ladder was neither negligence nor made the rig unseaworthy, because it was not a means of access to and from the scaffolding. Any reasonable person would realize the obvious danger of using it for access. Therefore, there was no obligation on the part of Mallard to warn of the danger or to prohibit the use of the ladder for access.

I find that the preponderance of the evidence shows that the scaffolding did move when Mr. Watterson attempted to get down from the scaffolding onto the ladder, and that this was caused by a failure to

properly secure the scaffolding. The purpose of securing the ends of the scaffolding is to prevent the scaffolding from moving while the workers are using it. And that failure to secure the ends of the scaffolding was a cause, in fact, and a proximate cause of Mr. Watterson falling to the keyway deck.

I also find by a preponderance of the evidence that Mr. Watterson acted unreasonably in attempting to get onto the ladder from the scaffold. As I previously stated, it was, any reasonable person would realize the obvious danger in doing that. Because Mr. Watterson may have fallen even if the scaffolding was properly secured, there's no evidence, I cannot find by a

preponderance of the evidence, one way or the other, that he would have, would or would not have fallen had the scaffolding been properly secured. But the fact that he attempted to get on this ladder with nobody holding it, there was a very good chance that he would have fallen regardless of whether it was secure.

Therefore, in assigning percentages of fault in causation, I find that Mr. Watterson was primarily, the greater percentage of fault would be placed on Mr. Watterson. Because not only as I mentioned before, but him pushing against the scaffolding in order to gain access to the ladder is not a normal action that would be expected, a normal force against the

scaffolding, the security it was designed to defend. Therefore, I find 85% on Mr. Watterson and 15% on Mallard Bay.

With regard to damages for pain and suffering, this is before applying percentages, the total amount of pain and suffering, I find an award of $250,000.00. For loss of income, I find an amount of $248,000.00.

With regard to loss of consortium and punitive damages, for the same reasons cited in Jenkins v. Kerr McGee Corporation, I find that there is no consortium, loss of consortium or punitive damages to be awarded in this case. I'll order that all cost be paid by Mallard Bay Drilling and its insurer. And of course, these amounts of damages

would be with interest from date of judicial demand until paid. And I also found that there was no, there was not sufficient evidence on which to base future medical expenses.

BY MR. BELCHER:

Judge, how about the loss of past wages?

BY THE COURT:

Oh, I'm sorry. The loss income includes past, includes all of that.

(END OF PROCEEDING)

AUBRY AND MARTY WATTERSON	*	**16TH JUDICIAL DISTRICT**
VERSUS	*	**NUMBER 72865**
	*	
MALLARD BAY DRILLING, INC.	*	**IBERIA PARISH, LOUISIANA**

* *

JUDGMENT

The trial of this matter was held on March 22 and March 23, 1993. After due consideration of the issues and for the reasons orally assigned on March 23, 1993:

IT IS ORDERED:

1. Judgment in favor of the plaintiff, Aubry Watterson, and against defendants, Mallard Bay Drilling, Inc. ("Mallard") and certain underwriters (collectively "Blair") as follows:

a. Plaintiff is found to have been 85% at fault and Mallard 15%

at fault for the accident which occurred on October 23, 1990.

b. Plaintiff is found to have sustained general damages in the amount of TWO HUNDRED AND FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS for past and future loss of income.

c. Based on plaintiff's fault of 85%, plaintiff is awarded damages of SEVENTY-FOUR THOUSAND SEVEN HUNDRED SEVENTY-SIX AND 20/100 ($74,776.20) DOLLARS against Mallard and Blair, with judicial interest from April 23, 1991.

2. Judgment in favor of defendants, Mallard and Blair, and against plaintiff, Aubry Watterson, dismissing with prejudice his claim for punitive damages.

3. Judgment in favor of defendants, Mallard and Blair, and against plaintiff, Marty Watterson, dismissing with prejudice her claim for loss of consortium.

4. Court costs shall be paid by Mallard and Blair.

Judgment read and signed in St. Martinville, Louisiana, this 29th day of March, 1993.

/s/ Paul deMahy

Judge, 16th Judicial District Court

FILED: March 31, 1993

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

DOCKET NO.

AUBRY WATTERSON, ET AL
Appellant

VERSUS

MALLARD BAY DRILLING, INC., ET AL
Appellees

ON APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT,
PARISH OF NEW IBERIA, STATE OF LOUISIANA
HONORABLE PAUL J. DEMAHY, JUDGE PRESIDING

Docket Number 93-01494

CIVIL PROCEEDING
ANSWER TO DEVOLUTIVE APPEAL

PERRET, DOISE, DAIGLE, LONGMAN,
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ANSWER TO DEVOLUTIVE APPEAL

Mallard Bay Drilling, Inc. ("Mallard") and Malcolm Walter Blair for and on behalf of M. W. Blair and others, as representative of Certain Underwriters at Lloyd's London and Phoenix Assurance Public Limited Company, Excess Insurance Company Limited, Yorkshire Insurance Company Limited, Sovereign Marine and General Insurance Company Limited, Yokio Marine and Fire Insurance Company (UK) Limited, Taisho Marine and Fire Insurance Company (UK) Limited, Storebrand Insurance Company (UK) Limited, Atlantic Mutual Insurance Company, Wausau Insurance Company (UK) Limited, Minster Insurance Company Limited, The Marine Insurance Company Limited, Orion Insurance Company Public Limited Company, Skandia U.K. Insurance Public Limited Company, Yasuda Fire and Marine Insurance

Company of Europe Limited, Norwich Union Fire Insurance Society Limited, Ocean Marine Insurance Company Limited, Sphere Drake Insurance Public Limited Company, Dai Tokyo Insurance Company (UK) Limited, Lombard Continental Insurance Public Limited Company, British and Foreign Marine Insurance Company Limited, London and Hull Maritime Insurance Company Limited, Scor (UK) Reinsurance Company Limited, English and American Insurance Company Limited, Switzerland UK Insurance Company Limited, Nippon Fire and Marine Insurance Company (Europe) Limited, Fuji International Insurance Company Limited, Northern Assurance Company Limited, Prudential Assurance Company Limited, Pearl Assurance Public Limited Company, Scottish Lion Assurance Company Limited, Alliance International Insurance Company Limited, Hansa Marine Insurance Company

(UK) Limited, Vesta (UK) Insurance Company Limited, Bishopsgate Insurance Company Limited, Threadneedle Insurance Company Limited, The Prudential Assurance Company Ltd. "Trust" A/C 'No. 2', Bishopsgate Insurance PLC, Phoenix Assurance PLC 'A' A/C, Terra Nova Insurance Company Ltd., Northern Assurance Company Ltd., 'No. 6' A/C, Uni-Polaris Insurance Company Ltd. 'T' A/C, Minster Insurance Company Ltd. '3' A/C, Chancellor Insurance Company Ltd., Sirins (U.K.) Ins. Co., Atlas Assurance Co., M.O.A.C. (No. 2) A/C,
Riunione Adriatica di Sicurta, and Hafnia Ins. Co. (collectively "Blair") answer the appeal of Aubry Watterson and Marty Watterson as follows:

1. The district court entered a final judgment on March 29, 1993.

2. The district court rendered judgment in favor of Aubry Watterson against Mallard and Blair. Aubry Watterson was found to have been 85% at fault and Mallard 15% at fault for the accident which occurred on October 23, 1990. Aubry Watterson was held to have sustained general damages of $250,000 and past and future wage loss of $248,508. Based on Aubry Watterson's fault of 85%, Aubry Watterson was awarded damages of $74,776.20 against Mallard and Blair with judicial interest from April 23, 1991.

3. Mallard and Blair were served on June 16, 1993 with devolutive appeal filed by Aubry Watterson and Marty Watterson.

4. Mallard and Blair assert that the district court should have held that Aubry Watterson was soley responsible for the accident. The district court erred

in holding that Mallard was at fault for the accident.

5. Alternatively, the district court also erred in holding that Aubry Watterson (a) had sustained damages of $498,508; (b) was entitled to judicial interest from April 23, 1991; and (c) had a right of direct action against Blair.

Mallard and Blair request that:

1. The judgment appealed from be modified to hold that Aubry Watterson was solely at fault for the October 23, 1990 accident and that Mallard was not at fault;

2. Alternatively, the judgment appealed from be modified to:
(a) reduce the amount of damages from $498,508.00 to $300,000.00; (b) delete the award of prejudgment interest, and;

(c) hold that Aubry Watterson does not have a right of direct action against Blair;

3. The amended judgment be affirmed;

4. Appellant be ordered to pay the costs incurred in both the district court and the appellate court;

5. Grant Appellees such other relief as is just.

Respectfully submitted,

PERRET, DOISE, DAIGLE, LONGMAN,
RUSSO & ZAUNBRECHER

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ATTORNEY FOR DEFENDANTS-APPELLEES

No. 93-1494
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

AUBRY WATTERSON, et al

Plaintiffs/Appellants

VERSUS

MALLARD BAY DRILLING, INC., et al

Defendants/Appellees

Appeal from the 16th Judicial District Court, Parish of Iberia, State of Louisiana, Honorable Paul J. deMahy, District Judge, Presiding

Before GUIDRY, DOUCET, LABORDE, COOKS and BERTRAND*, JJ.

BERTRAND, Judge

This maritime action was tried without a jury and resulted in a $498,508 award to plaintiff against the shipowner

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* Judge Lucien C. Bertrand, Jr., Retired, participated in this decision by appointment of the Louisiana Supreme Court as Judge Pro Tempore.

**Doucet dissents and assigns reasons; Guidry dissents for the reasons assigned by Doucet

and its insurers, but reduced by 85% contributory negligence of the plaintiff. Watterson appeal and assigned six errors. Mallard answered the appeal and urged three errors.

Plaintiff, Aubry Watterson, an employee of Mallard Bay Drilling, Inc., sued Mallard under the Jones Act and general maritime law, for injuries he allegedly sustained in the course of his employment.

the parties stipulated that on October 23, 1990, the day of the accident, Watterson was employed by Mallard as a "floorhand" and a member of the crew assigned to its inland drill barge, Mallard Bay Rig #27, located in Terrebonne Parish in navigable waters.

Watterson was hired by Mallard, a drilling contractor, in May of 1990 and assigned to Mallard Bay Rig #27, an

inland barge. He had previously worked on this rig for two years when it was owned by another drilling contractor. Watterson was an experienced hand with over seven years in the oil patch. During October 1990, Rig 27 was on location in Catfish Lake, within the territorial waters of Louisiana. As a floorhand, Watterson worked seven days "on" and seven days "off.

On October 23, 1990, Watterson and his fellow crew members arrived on the rig to begin their seven day hitch. Shortly after beginning their tour at 6:00 a.m., Watterson and fellow crew member, James Jones, were assigned to chip paint on the rig's substructure above the keyway deck which is located on the bottom deck of the rig directly below the rig floor. The rig crews had been chipping paint on the substructure for

several months. In order to chip the substructure above the keyway deck, an aluminum, non-skid scaffold board was used. It was positioned between the crane motor deck and the shale shaker deck some 10 to 12 feet above the keyway deck. The crew members could step easily from the crane motor deck to the scaffold. After receiving instructions from the driller, Watterson and his co-employee, Jones, left the rig floor, walked down to the pipe rack and from the pie rack onto the crane motor deck. Watterson was wearing a safety harness which he attached to an overhead beam after stepping from the crane motor deck onto the scaffold board. Watterson noticed water on the scaffold board and decided to clean it up with rags that were located in a room below him on the keyway deck.

Watterson spotted a wooden ladder, below the scaffold, on the keyway deck. Instead of climbing off the scaffold the same way he climbed on, Watterson decided to take a short cut by climbing down from the scaffold board to the ladder. He voluntarily chose to use the ladder although he had been told not work on top of a ladder. He had not been told to use the ladder (nor had he seen anyone else use it). Nothing prevented Watterson from getting off the scaffold the same way he had gotten on. The top of the ladder was approximately one foot from and two feet below the scaffold board with the steps of the ladder facing away from the scaffold. Watterson knelt down on the edge of the scaffold facing the crane deck. The ladder was behind him and to his right. He attempted to shimmy

off the scaffold groping for the ladder with his right leg.

Watterson testified that the scaffold board shifted, and he fell onto the ladder and then to the keyway deck. He admitted that prior to the accident, the scaffold never slipped or moved and was sturdy.

ACTIONS OF THE TRIAL COURT

The court found that the scaffold was extended from the crane motor deck to the pipe joints or rack and there was no unseaworthiness or negligence in providing access to the scaffold. He found that the lack of a railing on the scaffold was not a proximate cause of the accident because a railing would have prevented an inadvertent fall from the scaffold, not Watterson's intentional attempt to climb off the scaffold. He

found that the presence of the ladder was neither negligence nor did it make the rig unseaworthy because it was not to be used as a means of access to and from the scaffold and that any reasonable person would realize the obvious danger of using it for access. Therefore, there was no obligation on the part of Mallard to warn of the danger or to prohibit the use of the ladder for access.

The trial court found, as a matter of fact, that the scaffold did move when Watterson attempted to get down from it onto the ladder and that this was caused by a failure to properly secure the scaffold. The court further found that the purpose of securing the ends of the scaffold is to prevent it from moving while in use, and this failure was a cause in fact and a proximate cause of Watterson falling to the keyway deck.

The trial court assigned 85% of the fault to Watterson and 15% to Mallard.

ISSUES

The issues presented in this appeal are set forth in the respective parties' assignments of error. Plaintiff, Watterson, contends that the trial court erred in the following respects:

1. The trial court erred in not applying 45 U.S.C. § 53 and the *Kernan* Rule to bar contributory negligence on the part of Watterson.

2. The trial court erred in applying the standard of "ordinary care" and not "slight care" in this Jones Act case.

3. The trial court erred in finding Watterson is 85% contributorily negligent in this case.

4. The trial court erred in not using the "scintilla of evidence" standard of the Jones Act, instead of the "preponderance of the evidence" standard, which is used to measure the conduct of Watterson.

5. The trial court erred in awarding only $250,000 in general

damages for two fusion surgeries to a 28 year old seaman.

6. The trial court erred in not awarding "found".

Defendant, Mallard, in its answer to the appeal assigns the following errors:

1. Was the trial court's finding that Mallard was 15% at fault manifestly erroneous?

2. Was the trial court's finding that Watterson sustained damages of $498,508 manifestly erroneous?

3. Did the trial court err in awarding prejudgment interest on items of future damages.

Plaintiff's first four assignments of error and defendant's first assignment of error will be addressed together. They all deal with negligence, standard of care and the allocation of fault.

In a Jones Act case, evidence of the slightest negligence is sufficient to sustain a finding of Jones Act liability, and the plaintiff's burden to show causation is "featherweight". *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347

(5th Cir. 1988), cert. denied, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988); *Daugherty v. Cross Marine, Inc.*, 598 So.2d 595 (La. App. 4th Cir. 1992).

Under this standard, the trial court's finding that Mallard was negligent in failing to properly secure the scaffold is supported by the evidence and thus not clearly erroneous. Likewise, the trial court was not in error in finding Watterson negligent in attempting to leave the scaffold by way of the ladder.

Both Watterson and Mallard complain about the percentage of fault assess them by the trial judge. Mallard contends that the sole cause of the accident was Watterson's voluntary decision to try a short cut. This argument has no merit. The trial court in its oral reasons stated that:

> I find that the preponderance of the evidence shows that the scaffolding did move when Mr. Watterson attempted to get down from the scaffolding onto the ladder, and that this was caused by a failure to properly secure the scaffolding. The purpose of securing the ends of the scaffolding is to prevent the scaffolding from moving while the workers are using it. And that failure to secure the ends of the scaffolding was a cause, in fact, and a proximate cause of Mr. Watterson falling to the keyway deck.

Our manifest error standard of review of fact is applicable in this case. *Hanks v. Barge Transport Co., Inc.*, 563 So.2d 1297 (La. App. 3rd Cir.), writ denied, 569 So.2d 964 (La. 1990). The trial court's finding of negligence on the part of Mallard is supported by the evidence and is not clearly wrong.

The respective duties of an employee and a seaman were discussed by the U.S. fifth Circuit Court of Appeals in *Ceja v.*

Mike Hooks, Inc., 690 F.2d 1191 (5th Cir. 1982), wherein the court stated:

> In contrast to the broad duty imposed upon a vessel owner [employer] to supply a safe work place, the seaman's duty to protect himself is slight. *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1056-57 (5th Cir. 1981).

690 F.2d at p. 1193

Considering the relative burdens of the parties involved and the facts revealed by the record, we find that the trial judge committed clear error in his apportionment of fault at 85% to Watterson and 15% to Mallard. However, for the reasons to follow, there is no need for us to reapportion fault.

Watterson urges that the trial court erred in not applying 45 U.S.C. § 53 to bar a finding on contributory negligence on the part of Watterson. That section of the U.S. Code provides:

> In all actions . . . brought against any such common carrier by railroad employees under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Emphasis added)

This provision of the FELA was made applicable to actions under the Jones Act by the U.S. Supreme Court in *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958). *Kernan* is the leading case concerning the operation of Section 53 of the FELA in a

Jones Act case. Section 53 of FELA bars a court from considering the contributory negligence of the seaman if the employer has violated a statute enacted for the safety of employees. *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037 (5th Cir. 1985).

In this case, the status of Rig 27 as a vessel and the plaintiff as a seaman were not challenged by the parties; therefore, Watterson's claim arises under the Jones Act, 46 U.S.C. Section 688, et seq., which provides seamen an action for personal injury. The rights afforded seamen against their employers under the Jones Act are the same as those enjoyed by railroad employees under the Federal Employers' Liability Act (FELA), 45 U.S.C. Sections 51-60. The Jones Act explicitly incorporates the FELA, including Section 53.

Watterson contends that Mallard's failure to properly secure the scaffold to prevent movement constitutes a violation of a "statute enacted for the safety of employees" and that the violation contributed to his injuries.

The Coast Guard, generally, has jurisdiction over the operations of vessels and the conduct of the crew. The America National Standards (ANSI) are incorporated by reference into the Coast Guard regulations 46 C.F.R. § 107.115. The Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651, et seq., provides regulations to insure safe and healthful working conditions to the working people of the nation. It applies to employment performed in work places in the states, the District of Columbia, the various territories and protectorates of the United States and to the outer

continental shelf lands. See *Reich v. Nelson*, 843 F. Supp. 20 (E.D. Pa. 1994).

The OSHA regulations at 39 C.F.R. § 1910.28 (a)(11) provide that all scaffold planking or platforms shall be secured from movement. The ANSI contains a similar provision.

Watterson's witness, Dr. Percy Miller, an expert in the field of mechanical and safety engineering, testified without contradiction that Mallard's failure to secure the scaffold properly constituted a violation of the safety standards set out in both OSHA and ANSI.

The scaffold board used in the instant case was lashed to a three inch pipe or tubing with a braided cotton line called a sash cord. Dr. Miller,, in describing this procedure as faulty, testified as follows:

Q. Now, based on your experience as an expert, you're telling me that the scaffold, even though it's lashed down with that rope -- did I show you the type of rope that might be involved in this deal? He said he thought it might be a quarter inch, is this something that's --

A. Yes, sir, that's called a sash cord. That's a braided cotton line.

Q. Can that securely hold a scaffold to the tubing that was in question?

A. No, it can't because you can't lash it that way.

Q. Well, you can tie it, Dr. Miller, can't you?

A. Yeah, but you have, in order to fix the scaffold board to the pipe, you have to go around the scaffold board which is forty-eight inches plus ten inches of the height of the board, and then you go around the pipe. Well, when you have

fifty-eight inches of free length, then you cannot depend on this to be tight.

Q. In other words --

A. You can't make it tight.

Q. -- in your opinion, it will definitely give some, it will shift?

A. Yes.

Q. Is that what you're telling us?

A. You can't tie it that tight, not with human hands.

Considering this evidence, we must conclude that Mallard violated the safety standards incorporated in OSHA and ANSI.

We must next determine if either OSHA or ANSI govern the working conditions aboard Rig 27. The parties stipulated that the rig was an inland drill barge, and although no evidence was offered to show whether the barge was inspected by the Coast Guard, the

parties, by admission in their briefs, acknowledge that Rig 27 is an inland uninspected vessel.

Mallard, in its brief, correctly points out that the Coast Guard regulations do not apply. It states, "An inland barge such as Rig. No. 27 is not inspected by the Coast Guard and does not fit any of the three categories of mobile offshore drilling units" contained in 46 C.F.R. 107. However, Mallard is in error when it claims that the OSHA regulations do not apply to inland barges.

Dr. Miller testified as to the existence of a memorandum of understanding between OSHA and the Coast Guard whereby OSHA assumes responsibility for the regulation of working conditions of employees aboard uninspected vessels. An "uninspected vessel" is a term used to denote that a vessel is not subject to

the Coast Guard's inspection and certification authority. 46 U.S.C. § 2101(43).

OSHA possesses statutory authority to regulate the working conditions aboard uninspected vessels. *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2nd Cir. 1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1355, 84 L.Ed. 2d 377 (1985); *Reich v. Nelson*, 843 F. Supp. 20 (E.D. Pa. 1994). See also In *Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), cert. denied, 479 U.S. 883, 107 S.Ct. 271, 93 L.Ed.2d 248 (1986).

Mallard contends that courts have rejected the application of OSHA regulations to vessels. It cites as authority the cases of *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983), *Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980), and *National Marine Service, Inc. v. Gulf Oil*

Co., 433 F. Supp. 913 (E.D. La.), aff'd, 608 F.2d 522 (5th Cir. 1979). Both *Donovan v. Texaco* and the *Clary* case stand for the proposition that OSHA regulations do not apply to the working conditions of "blue-water" seamen., that is, seamen on vessels navigating the high seas. *National Marine Service*, the third case relied upon by Mallard, is a case decided before *Red Star* and *Norfolk Dredging*, and before the issuance of the memorandum of understanding referred to by Dr. Miller.

Furthermore, the vessels involved in those cases would of necessity be subject to inspection by the Coast guard, and the memorandum of understanding which sanctions OSHA's regulations of uninspected vessels serves to exclude OSHA's jurisdiction over inspected vessels. See *Donovan v. Red Star Marine*

Services, Inc., supra, at page 778 where footnote 2 provides:

> In accordance with a "Memorandum of Understanding" signed by the Commandant of the Coast Guard and the Assistant Secretary for Occupational Safety and Health, Department of Labor, the Secretary has taken the position that "the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard inspected vessels," and that OSHA may not enforce its regulations with respect to "seamen" aboard inspected vessels.

It was established at trial by uncontradicted evidence that a violation of OSHA regulations occurred.

Watterson was an intended beneficiary of the OSHA regulations, and his injury was of the type against which the regulations were intended to protect. The requirement of securing scaffolds to prevent movement is to protect workers on the rig, and Watterson was a floorhand

working on the rig at the time of the accident. The purpose of securing scaffolds to prevent movement is to prevent falls by crew members using the scaffolds, and Watterson's injuries were a result of such a fall.

Because we find that the OSHA regulations are intended for the benefit of crew members, Section 53 of the FELA bars a consideration of Watterson's contributory negligence. We find no merit to the argument that OSHA renders Section 53 inoperable in this case. it has been held that 29 U.S.C. § 653(b)(4) of OSHA serves to prohibit the use of evidence of an OSHA violation to establish negligence per se under the FELA.[1] See *Ries v. National R.R.*

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[1] 29 U.S.C. § 653 (b)(4) provides:

> Nothing in this chapter shall be construed to supersede or in any

Passenger Corp., 960 F.2d 1156 (3rd Cir. 1992). We disagree with that holding and find that the more persuasive view is that articulated by the United States First Circuit in *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985). The *Pratico* court found that § 653(b)(4) presented "no obstacle to treating OSHA regulations as safety statutes under § 53 of FELA," 783 F.2d at p. 268, and necessarily, the Jones Act. This conclusion comports with the plain language of Section 53, the rationale of *Kernan*, supra, and the Fifth Circuit

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manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

jurisprudence cited with approval in *Pratico*.[2]

The *Pratico* court found that applying the doctrine of negligence per se to violations of OSHA regulations does not create any new rights, duties, or liabilities, as proscribed in § 653(b)(4) of OSHA. The court explained:

> The intent of Congress in enacting § 653(b)(4) was to prevent the creation of new tort remedies where none had previously existed. The elimination of contributory negligence for violation of a safety statute was a basic facet of the remedy provided by FELA long before OSHA was enacted. In fact, the legislative history of § 53 indicates that Congress considered this elimination of contributory negligence to simply be a reflection of the common law doctrine of

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[2]*Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231 (5th Cir. 1982); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Lowe v. General Motors Corp.*, 624 F2d 1373 (5th Cir. 1980).

> negligence per se: "The effect of the provision is to make a violation of such a statute negligence per se on the part of the employer. The courts of some states have held this as a principle of common law. Other states enacted it into statute." H.R.Rep. No. 1386, 60th Cong. 1st Sess. 6 (1908). As we found earlier, allowing OSHA regulations to be given effect in other statutory or common law actions is not the same as allowing the regulations, standing along, to create new actions.

783 F.2d at p. 268. Accordingly the judgment of the trial court is modified to delete the assessment of 85% fault to Mallard.

DAMAGES

The trial court awarded Watterson general damages in the amount of $250,000 for pain and suffering and past and future wage loss in the amount of $248,508. It found that the plaintiff had failed to prove future medical expenses. The trial court disallowed the

plaintiff's claims for loss of consortium and punitive damages, citing *Jenkins v. Kerr-McGee Corp.*, 613 So.2d 1097 (La. App. 3rd Cir.), writs denied, 616 So.2d 701, 702 (La. 1993). Plaintiff does not assign error to these rulings nor does he brief these issues; we, therefore, consider them to be abandoned and will not address these issues.

In its second assignment of error, Mallard contends that the trial court abused its discretion by awarding plaintiff a total of $498,508. It suggests that a proper award would be $175,000 in general damages and $153,000 in lost wages. Watterson, on the other hand, seeks an increase in general damages to $400,000.

It is well settled that the trier of fact has much discretion in awarding damages. La. C.C. Art. 2324.1 Recently

in *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993), our Supreme Court characterized this discretion as "'great' and even vast." In determining whether the fact finder has abused its much discretion in its award, the reviewing court must first examine the individual circumstances of the particular case before resorting to prior awards for guidance. *Reck v. Stevens*, 373 So.2d 498 (La. 1979). *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976).

On January 8, 1991, Watterson underwent a diskectomy, performed by Dr. Leoni, and a two level fusion, performed by Dr. Schutte, at L4-5 and L5-S1. He was hospitalized for seven days. The plaintiff continued to have pain and Dr. Schutte was of the opinion that the fusion at L4-5 was not solid.

Plaintiff went to see Dr. Cobb about the pain and Dr. Cobb confirmed that the L4-5 fusion was not solid. On May 6, 1992, Dr. Cobb performed surgery to regraft he L4-5 level.

Plaintiff was hospitalized until May 9. Thereafter, he continued to have pain which gradually subsided somewhat, and on September 30, 1992 he began therapy three times a week. This continued until November II, 1992, when he was released by Dr. Cobb. He still suffered pain off and on, and Dr. Cobb was of the opinion that he would never be pain free but would suffer mild pain from time to time.

Dr. Cobb released the plaintiff to medium level work which he described as limiting plaintiff to a maximum lifting of 50 lbs. at any one time infrequently, 20 lbs. frequently, and 10 to 15 lbs. continuously. Plaintiff was to avoid

vibrations, unprotected heights, and excessive vehicular exposure, and he was limited to walking, sitting and standing no more than three or four hours in any eight hour period. He reached maximum medical care on November 11, 1992; that is, no further medical treatment would improve his condition.

After a careful review of the record in light of the well established standard of review, we find that the trial court's award of $250,000 in general damages was not an abuse of discretion, and we therefore reject the request to increase by the plaintiff and to decrease by the defendant.

Mallard also complains that the award for lost wages is excessive. This contention is without merit. The trial court awarded the plaintiff $248,508 for past and future loss of income. This

amount is in line with the calculations provided by Dr. Rice, the economist who testified for plaintiff. However. the judgment rendered in this case failed to give Mallard a credit for maintenance paid to Watterson in the amount of $27,014. This was stipulated to by the parties. The award for lost wages will therefore be reduced to the sum of $221,494.

FOUND

In his last (6th) assignment of error, plaintiff complains of the failure of the trial court to make an award for "found." "'Found' is an admiralty term which describes the element of damages representing the value of the living expenses provided to a seaman by his employer as a condition of employment while aboard ship. Found generally includes expenses for food, lodging and

clothing." Frank L. Maraist, *Admiralty in a Nutshell* 194 (2d ed. 1988). *Youn v. Maritime Overseas Corp.*, supra at p. 1261.

The record in this case is devoid of any evidence concerning a loss of living expenses by plaintiff. The only reference to "found" is in the report of defendant's economist, Dr. Kenneth J. Boudreaux, who gave present value of future meal loss of $6,368.12. However, he stated that in his opinion, no such award should be made. There is no merit to this assignment of error.

PREJUDGMENT INTEREST

When as in this case a Jones Act suit is brought under the court's admiralty jurisdiction (tried to a judge) the award of prejudgment interest lies within the sound discretion of the trial judge. *Doucet v. Wheless Drilling*

Company, 467 F.2d 336 (5th Cir. 1972); *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985).

Mallard in its last assignment of error claims that the trial court erred in awarding interest from date of judicial demand on items of future damages. This challenge is meritorious as it relates to the interest on damages for future losses. *Verdin v. C & B Boat Co., Inc.*, 60 F. 2d 150 (5th Cir. 1988).

This court has held in three cases that prejudgment interest is not allowed on awards under general maritime law for loss of future earnings and future pain and suffering. *Smith v. Flotation Services, Inc.*, 596 So.2d 343 (La. App. 3rd Cir. 1992); *Savoie v. McCall's Boat Rentals. Inc.*, 491 So.2d 94 (La. App. 3rd Cir.), writs denied, 494 So.2d 334, 542 (La. 1986) and *Banks v. Magnolia*

Marine Transport Company, 6177 So.2d 192 (La. App. 3rd Cir.), writ denied, 620 So.2d 876 (La. 1993).

Three other Third Circuit cases have held, however, the denial of prejudgment interest is limited to future non-economic losses. *McFarland v. Justiss Oil Co.*, 526 So.2d 1206 (La. App. 3rd Cir. 1988); *Babineaux v. Lykes Bros. S.S. Co., Inc.*, 608 So.2d 659 (La. App. - 3rd Cir. 1992), writ denied, 610 So.2d 819 (La. 1993); and *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 3rd Cir. 1992), writs denied, 616 So.2d 686, 687 (La. 1993).

In maritime cases, prejudgment interest is ordinarily awarded from the date of loss. *Reeled Tubing, Inc. v. M/V Chad G.*, 794 F.2d 1026 (5th Cir. 1986).

The amount of past and future damages is not so easily calculated

because neither the trial court not this court has attempted to proportion the award between past and future damages.

It would present an undue burden on the litigants and the court to remand this case, so we somewhat arbitrarily, and in order to finalize the judgment in this case without remand, adopt the reasoning of this court in *Banks v. Magnolia Marine Transport Company*, supra, and conclude that the trial court properly exercised its discretion in the present case. The trial judge could have awarded prejudgment interest on past damages from the date of the accident (October 23, 1990) as opposed to suit date (April 23, 1991) and could have denied post-judgment interest altogether. By making all damages subject to interest, but dating only from judicial demand, the result is fair and certainly

not an abuse of the trial court's discretion.

DECREE

For the foregoing reasons, the judgment of the trial court is modified to assign 100% fault to Mallard Bay Drilling. The judgment is amended to reduce the damages awarded for lost wages to the sum of $221,494. In all other respects, the judgment is affirmed. Costs of this appeal are assessed equally to the parties.

AFFIRMED AS MODIFIED AND AMENDED.

NUMBER 93-1494

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

AUBRY WATTERSON, ET AL

Plaintiffs-APPELLANTS

VERSUS

MALLARD BAY DRILLING, INC., ET AL

DEFENDANTS-APPELLEES

DOUCET, Judge, dissenting.

It is well settled that in maritime actions (Jones Act cases), the rights accorded seamen against their employers are the same as those afforded railroad employees under the Federal Employees Liability Act (FELA). Further, under *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958) and 45 U.S.C. sec. 53 (part of FELA) a court is barred from considering the contributory

negligence of a seaman in those instances where an employer violates a statute enacted for the safety of employees.

In this case the scaffold from which plaintiff fell was found to be in violation of an OSHA safety standard f 39 C.F.R. sec. 1910.28(a)(11)] in that, although tied on both ends, it was able to "shift slightly" thereby contributing to Mr. Watterson's fall. Thus, the linchpin of this case is whether OSHA safety standards (regulations) are included under FELA as statutes enacted for the safety of employees and thus, does the violation, by an employer of an OSHA regulation, which results in injury to an employee bar a court from considering the contributory negligence of the injured employee?

Part of OSHA, specifically 29 U.S.C. sec. 61.;3(b)(4) provides as follows:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of or in the course of employment.

The majority, relying on *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1 Cir. 1985), finds "no obstacle to treating OSHA regulations as safety standards under sec. 53 of FELA". I disagree and find the reasoning and outcome in *Ries v. National Railroad Passenger Corporation*, 960 F.2d 1156 (3rd Cir. 1992), to be more compelling and, in my opinion, the true intent of Congress in enacting the various statutes. In

Ries, supra, at 1161 and 1162, the court stated:

> We find the analysis of *Pratico* to be unpersuasive, since we cannot agree that the only intended effect of section 653(b)(4) was to preclude the creation of a private right of action which would bypass workers' compensation. The First Circuit's analysis defies traditional principles of statutory interpretation which dictate that courts first look at the statute's language and the plain meaning of that language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "[O]nly the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984). See also *Immigration and Naturalization Serv. v. Elias-Zacarias*, ____ U.S. _____, _____, 112 S.Ct. 812, 816, 117 L.Ed.2d 38 (1992) ("In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words

used.'") (citation omitted); *GTE Sylvania*, 447 U.S. at 108, 100 S.Ct. at 2056 ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). Furthermore, the Supreme Court has counseled against giving too much weight to "the contemporaneous remarks of a single legislator who sponsors a bill," *id.* at 118, 100 S.Ct. at 2061, much less a non-legislator such as the Solicitor of Labor.

Section 653(b)(4) clearly states that OSHA shall not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees." If a violation of an OSHA regulation could constitute negligence per se and bar contributory negligence under the FELA, it would be almost axiomatic that the effect would be to "enlarge or diminish or affect" the statutory duty or liability of the employer. Even if we agreed with Ries' argument that imposing negligence per se for an OSHA violation would not "enlarge" employers' liability, since it merely defines an existing duty, we are hard pressed to say that it would not "affect" liability. Furthermore, a bar of

> contributory negligence which transforms Amtrak's loss from a $9,282.50 verdict to a $37,130 verdict clearly would "affect," if not "enlarge," the employer's liability. In short, it defies reason to construe section 653(b)(4) as only precluding private actions which would bypass workers' compensation. Had Congress intended such a result, it would not have drafted section 653(b)(4) in such sweeping terms.

Even the concurring judge in *Ries*, supra, agreed with the majority. At 1165 he states:

> I agree with the result reached by the majority, and with its reasoning to the extent that the plain meaning of OSHA, 29 U.S.C. sec. 653(b)(4), precludes a finding of negligence per se and a barring of contributory negligence in a FELA action.

I, too, share the foregoing conclusion. Accordingly, I dissent.

SUPREME COURT OF LOUISIANA

NO. 94-C-2769

AUBRY WATTERSON
PLAINTIFF/RESPONDENT

VERSUS

MALLARD BAY DRILLING, INC., AND
UNDERWRITERS OF MALLARD
DEFENDANTS/APPLICANTS

CIVIL PROCEEDING ON APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT
NO. 72865-D
PARISH OF IBERIA, STATE OF LOUISIANA

HONORABLE PAUL J. DEMAHY
and
THIRD CIRCUIT COURT OF APPEAL
NO. 93-01494

HONORABLE EDMOND L. GUIDRY, JR.
HONORABLE LUCIEN C. BERTRAND
HONORABLE NED E. DOUCET, JR.
HONORABLE P.J. LABORDE AND
HONORABLE SYLVIA R. COOKS

OPINION DATED OCTOBER 12, 1994

MALLARD BAY DRILLING, INC., AND CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON
APPLICATION FOR WRIT OF CERTIORARI
AND REVIEW

Respectfully submitted,

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MALLARD BAY DRILLING, INC.'S APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

I. INTRODUCTORY STATEMENT

This suit was filed against Mallard Bay Drilling, Inc. and its underwriters (collectively "Mallard") under the Jones Act, 46 U.S.C. § 688 and general maritime law for damages resulting from an accident that occurred on October 23, 1990. The primary issue addressed in this application is whether a violation of an OSHA regulation constitutes negligence per se and bars contributory negligence under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 53.[1] Also at issue is whether the award of pre-judgment interest on items of future

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[1]The Jones Act explicitly incorporates FELA. 48 U.S.C. § 688; Kernan v. American Dredging Co., 355 U.S. 42, 43, 78 S. Ct. 394, 398, 2 L. Ed. 2d 382 (1958).

damage by the lower courts was erroneous.

Neither this Court, nor the Fifth Circuit Court of Appeals, has ever addressed the specific issue of whether a violation of an OSHA regulation constitutes negligence per se to bar contributory negligence under FELA. The view followed by a majority of the federal circuits which have spoken on the issue is set forth in Ries v. National R.R. Passenger Corp., 960 F.2d 1156 (3d Cir. 1992).[2] Ries holds that OSHA is not a safety statute for purposes of FELA and a violation of an OSHA regulation does not constitute negligence per se to bar contributory negligence.

The Ries court found that Congress has mandated, in 29 U.S.C. § 653(b)(4)

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[2]Ries is supported by decisions of the Fourth and Sixth Circuits, and has recently been followed by the Ninth Circuit in Robertson v. Burlington Northern Railroad Company, 32 F.3d 408 (9th Cir., 1994).

that OSHA shall not "enlarge, diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees." As the court concluded, allowing a violation of an OSHA regulation to constitute negligence per se and bar contributory negligence would alter the rule of civil liability and violate the intent of Congress when it enacted OSHA.

In this case, however, the Third Circuit disagreed with the Ries holding and instead opted to follow the minority view of Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985), the only federal circuit case holding that the violation of an OSHA regulation is negligence per se to bar contributory negligence under FELA. As a result, the Third Circuit modified the judgment of the trial court to delete the 85% fault which had been assessed to the plaintiff,

and deemed Mallard to be solely at fault. Mallard submits the Third Circuit's reliance on Pratico is misplaced and only serves to compound that court's erroneous construction of 29 U.S.C. 653(b)(4).

The issue of whether a violation of OSHA constitutes negligence per se under FELA to bar contributory negligence presents this Court with a significant question of first impression. It has been estimated there are some 20,000 or more OSHA standards in existence.[3] If the holding of the Third Circuit is allowed to stand, it will have widespread impact on the litigation of Jones Act claims involving uninspected vessels. Undoubtedly, in nearly every case, the plaintiff will point to some violation of an OSHA regulation, no matter how minor, which somehow "contributed" to his

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[3]R.D. Moran, OSHA Handbook § 10.3.

accident. Regardless of whether the plaintiff is, in fact, 99% at fault for his injuries, under the reasoning of the Third Circuit, the plaintiff will be able to completely avoid responsibility. Certainly, even under the Jones Act, such a result is neither desirable nor warranted.

For these reasons, the matter is appropriate for review by this Court. Mallard requests the Court to exercise its jurisdiction under Article 2166 of the Louisiana Code of Civil Procedure and Rule 10 of the Rules of the Louisiana Supreme Court, and grant this application.

II. STATEMENT OF THE CASE

A. Background

Aubry and Marty Watterson filed suit against Mallard Bay Drilling, Inc. ("Mallard") as a result of an accident

that occurred on October 23, 1990. The plaintiffs made claims under the Jones Act, 46 U.S.C. § 688, and general maritime law.[4] Mallard denied any liability for the accident and asserted that Aubry Watterson was solely to blame. Mallard further asserted that Marty Watterson had no cause of action against Mallard for loss of consortium. (TR 16). Shortly before trial, the underwriters of Mallard were added as defendants.[5] A peremptory exception was filed asserting that the Wattersons had no direct action against underwriters. (TR 89).

B. Facts

Aubry Watterson was hired in May 1990 by Mallard, a drilling contractor. (TR 1001-1002). He was an experienced

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[4]See Watterson's petition, at Exhibit "A".

[5]A complete listing of the underwriters is contained on Exhibit "B".

hand as he had worked in the oil patch for over seven years. (TR 1054). Watterson was assigned to Mallard Rig No. 27, an inland drill barge. Watterson had previously worked on the rig for two years when it was owned by another drilling contractor. (TR 1054).

During October 1990, Rig 27 was on location for Texaco in Catfish Lake, within the territorial waters of Louisiana. (TR 1207; Mallard Exhibit No.3). Watterson, as a floorhand, worked seven days "on" and seven days "off". On October 23, 1990, Watterson and the rest of the crew arrived on the rig in order to begin their seven day hitch. (TR 1207).

Shortly after beginning their tour (shift) at 6 a.m., Watterson and a fellow crew member, James Jones, were assigned to chip paint on the rig's substructure above the keyway deck. (TR 1056). The

keyway was located on the bottom deck of the rig and was directly below the rig floor. (See Mallard Exhibit No. 4). The crews of Rig No. 27 had been chipping the substructure for several months. (TR 1208). In order to chip the substructure above the keyway deck, an aluminum non-skid scaffold board was used. (TR 1060). It was positioned between the crane motor deck and the shale shaker deck, approximately twelve feet above the keyway deck. There were different versions as to how the scaffold was positioned.[6] Everyone but Watterson testified that the crew members could step easily from the crane motor deck to the scaffold. (TR 1091, 1209-1211, 1235-

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[6]Watterson has one version (Mallard Exhibit No. 2; TR 1027); James Jones, a floorhand, had a second version (Mallard Exhibit No. 1; TR 1091); and the toolpusher and drillers had a third version (Mallard Exhibit No. 4; TR 1235, 1209 and 1257).

1236). The scaffold was erected in the typical fashion. (TR 1215). No one had ever been injured while working on the scaffold. (TR 1239).

After receiving instructions from the driller, Watterson and Jones left the rig floor. They walked down to the pipe rack and then from the pipe rack onto the crane motor deck. (TR 1056). Watterson was wearing goggles and a safety harness. (TR 1056). After stepping from the crane motor deck onto the non-skid aluminum scaffold board, he attached the cable on his safety harness to an overhead beam. (TR 1060). While wearing his harness, it was impossible for him to fall off of the scaffold. (TR 1060). Once on the scaffold board, Watterson decided that he wanted to wipe it off with rags. The rags were located in a room on the keyway deck. Watterson spotted a wooden ladder below him on the keyway deck. (TR

1061). Instead of getting off the scaffold the same way he got on, Watterson decided to take a short cut by climbing down onto the ladder. (TR 1061). Although he had been instructed not to work on top of a ladder, he voluntarily chose to climb onto the top of the ladder. (TR 1063). Watterson did not have the approval of his driller to climb onto the ladder. (TR 1061). He had not been told to use the ladder nor had he seen anyone else use it. (TR 1061). Nothing prevented Watterson from getting off the scaffold the same way he had gotten on. (TR 1061).

The top of the ladder was approximately one foot from the scaffold board with the steps of the ladder facing away from the scaffold. (TR 1062, 1065; Mallard Exhibit No. 2). The top of the ladder was one to two feet below the scaffold. (TR 1062). Watterson did not

bother to move the ladder closer to the scaffold before attempting his short cut. (TR 1064-1065).

In order to accomplish his risky maneuver, Watterson knelt down on the edge of the scaffold while facing the crane motor deck. (TR 1063-1064). The ladder was behind him and to his right. (TR 1063). He shimmied off of the scaffold and groped for the ladder with his right leg. (TR 1063-1064). Watterson testified:

> Q Then you got on your knees about right here? (Indicating)
>
> A Yes, sir.
>
> Q Sort of like you were praying?
>
> A Yes, sir.
>
> Q And you were facing the crane motor deck?
>
> A Yes, sir.

Q And then at that point, the ladder was behind you, about a foot behind you?

A Roughly, yes, sir.

Q And you kind of shimmied to the edge of the scaffold on your knees?

A Well, I didn't slide down the -- rephrase it.

Q You kind of shimmied to where you got right on the edge of the scaffold with your knees.

A Yes, lowering myself.

Q And then in that position, you took your right knee off the scaffold and tried to grope for the ladder in order to put your foot onto the ladder?

A Yes, I was reaching for the ladder.

(TR 1063-1064).

Not surprisingly, while trying to accomplish this maneuver, Watterson ended

up falling onto the ladder and then down to the keyway deck. Although there are different versions as to how the scaffold was positioned, there is no dispute that Watterson voluntarily chose this short cut. (TR 1061). His own expert admitted the following:

Q Now, there's no doubt that Mr. Watterson chose to use the short cut on his own?

A It's possible.

Q At your deposition, I asked you, Dr. Miller, didn't Mr. Watterson choose to take a short cut on his own and you told me yes.

A Yeah.

Q You're not changing your testimony?

A No, no. He attempted to go that way.

Q Safety on the rig is everybody's concern?

A Everybody's concern.

(TR 1154).

Watterson admitted that prior to the accident, the scaffold never moved or slid. (TR 1061). While he was walking on it, the scaffold was sturdy. (TR 1061). Likewise, he admitted there was nothing wrong with the ladder. (TR 1067). Nor was there oil or grease on it. (TR 1067).

After the accident, Watterson complained of having a sore back but completed the remainder of his seven day hitch. He subsequently sought medical attention and ultimately underwent a fusion of L4-5 and L5-S1 on January 9, 1991. (TR 251, 253). The L4-5 level was re-fused on May 6, 1992. (TR 350). The initial treating physician, Dr. John Schutte, causally related the surgery in part to facet arthritis and degenerative disc disease which preexisted the

accident. (TR 264-265). After making a good recovery, Watterson reached maximum medical improvement on November 11, 1992 and was discharged from the care of Dr. John Cobb, his treating physician. (TR 360). Dr. Cobb has opined that Watterson can return to medium level work. (TR 360).

C. Action of the Trial Court

After a two day trial, the trial court found Watterson to have been 85% at fault and Mallard 15% at fault for the accident. The court found that Watterson had acted unreasonably in attempting to get onto the ladder from the scaffold. The allocation of 15% fault to Mallard was based on the court's finding that the scaffolding Watterson was climbing off of at the time of his accident had not been completely secured to prevent its movement, and that this was a proximate

cause of the accident. However, the court also found that there was a very good chance Watterson would have fallen even if the scaffold had been secured. (TR 1297-1299). The court made no specific finding that either an OSHA or Coast Guard regulation had been violated.

Watterson was held to have sustained general damages of $250,000 and past and future wage loss of $248,508. Based on Watterson's fault of 85%, he was awarded damages of $74,776.20 against Mallard and underwriters with judicial interest from the date the suit was filed. The trial court granted Mallard's peremptory exceptions and dismissed Watterson's claim for punitive damages and Marty Watterson's claim for loss of consortium.[7]

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[7]See trial court's reasons for ruling, TR 1296 - TR 1300, attached as Exhibit "C".

D. Action of the Appellate Court

Watterson filed a devolutive appeal asserting, among other things, that the trial court had erred in not applying 45 U.S.C. § 53 and the Kernan[8] rule to bar contributory negligence on the part of Watterson. Watterson claimed that Mallard's failure to completely secure the scaffolding violated a safety regulation and constituted negligence per se to bar contributory negligence. At first, Watterson argued that failure to secure the scaffolding violated a Coast Guard regulation. In subsequent briefs to the appellate court, Watterson asserted that because he had been injured on an uninspected inland drill barge, for which Coast Guard regulations do not apply, the failure to secure the

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[8]See Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958).

scaffolding was a violation of OSHA. Mallard has, and continues to contest the applicability of either OSHA regulations or Coast Guard regulations.

After a hearing before a five-judge panel, the Third Circuit acknowledged that instead of climbing off the scaffold the same way he got on, Watterson voluntarily decided to take a short cut by climbing down from the scaffold board to the top steps of the ladder, even though he had been told not to work on top of a ladder, and nothing prevented him from getting off the scaffold the same way he had gotten on. However, the court also concluded that when Watterson attempted to shimmy off the scaffold as he groped for the ladder below, the scaffold board shifted, which caused him to fall to the keyway deck.

On that evidence, the court modified the trial court's ruling by assigning

100% fault to Mallard. In so holding, the court held that Mallard's failure to secure the scaffolding was a violation of OSHA. The court reasoned that OSHA is a safety statute under FELA, and therefore under 45 U.S.C. § 53, consideration of Watterson's contributory negligence was precluded.[9] The court also affirmed the lower court's award of pre-judgment interest on all items, including future damages, from the date of judicial demand.[10] A copy of the Third Circuit's ruling is attached as Exhibit "D".

III. ASSIGNMENT OF ERRORS

1. The appellate court erred in barring the contributory negligence of Watterson and assigning Mallard 100%

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[9]Judges Guidry and Doucet dissented on this issue.

[10]Although it assigned Mallard 100% fault, the appellate court also reduced Watterson's lost wages award by $27,014, to $221,494.

fault. Under the Jones Act, to establish negligence per se, there must be a violation of a Coast Guard regulation, which did not occur. Even if an OSHA violation occurred, 29 U.S.C. § 653(b)(4) of OSHA prohibits the use of the violation of an OSHA regulation to establish negligence per se to bar contributory negligence.

2. The appellate court erred in affirming the trial court's award of pre-judgment interest on all items of damages from the date of judicial demand. Interest should not have been awarded on items of future damages.

IV. ISSUES FOR REVIEW

1. Does a violation of an OSHA regulation constitute negligence per se under FELA to bar contributory negligence?

2. Is it an error to award pre-judgment interest on items of future damages?

V. SUMMARY OF THE ARGUMENT

The appellate court erroneously modified the judgment of the trial court, which had assessed 85% of the fault to Watterson, to assign 100% of the fault to Mallard. The court based its modification on its adoption of the holding in Pratico that a violation of an OSHA regulation constitutes negligence per se to bar contributory negligence under 45 U.S.C. § 53. Applying Pratico, the court concluded that Watterson's contributory negligence should be barred.

In so holding, the appellate court ignored the fact that an essential element of negligence per se in a Jones Act case, the violation of a Coast Guard regulation, is absent. The Coast Guard

regulations do not apply to the inland vessel Watterson was working on when his accident occurred. Because the regulations do not apply, there was no violation.[11]

Even if, as the appellate court determined, an OSHA regulation applied and was violated (both of which Mallard denies), such a violation does not constitute negligence per se. The majority, and better-reasoned view, is set forth in Ries: OSHA is not a safety statute under FELA and a violation of an OSHA regulation does not constitute negligence per se to bar contributory negligence pursuant to 45 U.S.C. § 53 of FELA. As stated in Ries, to hold

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[11]In cases where Coast Guard regulations do apply, some courts have held the violation constitutes negligence per se. However, unlike OSHA, the Coast Guard regulations do not contain a limitation in their use to alter the rule of civil liability.

otherwise would be to violate Congress' mandate in Section 653(b)(4) of OSHA that it not be used to "enlarge, diminish or affect in any manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment." Allowing a violation of an OSHA regulation to bar Watterson's contributory negligence in this case would have just such an effect. It would deem Mallard to be negligent per se when the general maritime law and the laws of Louisiana, which do not recognize a violation of an OSHA regulation as negligence per se, would not.

In addition, the trial court awarded, and the appellate court affirmed, pre-judgment interest on the entire judgment. Under well-settled case law, the award of pre-judgment interest

on Watterson's future damages is not proper, and should be reversed.

VI. ARGUMENT

ISSUE NO. 1

A. NEGLIGENCE PER SE DOES NOT APPLY BECAUSE NO COAST GUARD REGULATION WAS VIOLATED

There are five elements which must be met in order to have negligence per se applicable in a Jones Act case. The five elements are:

a. A violation of Coast Guard regulations;

b. The plaintiff's membership in the class of intended beneficiaries of the regulations;

c. An injury of a type against which the regulations are designed to protect;

d. The unexcused nature of the regulatory violation; and

e. Causation.

Smith v. Trans-World Drilling Co., 772 F.2d 157 (5th Cir. 1985), citing Reyes v. Vantage S.S. Co., Inc., 558 F.2d 238, 242-44 (5th Cir. 1977), modified, 609 F.2d 140 (5th Cir. 1980). The Third Circuit specifically found that OSHA, and not the Coast Guard, regulated the uninspected vessel upon which Watterson was injured.[12] Because there was no violation of a Coast Guard regulation by Mallard, negligence per se is not applicable. Due to the absence of at least one of the five necessary elements, the contributory negligence of Watterson is not barred.

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[12]Mallard has, and continues to contest the applicability of either OSHA regulations or Coast Guard regulations to an inland drill barge. Even if OSHA regulations are applicable, there was no violation by Mallard. The trial court made no specific finding of an OSHA violation in its reasons for ruling. (TR 1296-1300).

In modifying the trial court's assignment of 85% fault to Watterson, the Third Circuit relied, in part, on Kernan v. American Dredging Co., 355 U.S. 42, 43, 78, S. Ct. 394, 398, 2 L.Ed. 2d 382 (1958) and Roy Crook and Sons, Inc. v. Allen, 778 F.2d 1037 (5th Cir. 1985). However, these two cases are different because they involved the violation of a Coast Guard regulation. An OSHA violation was not at issue. As will be explained more fully below, under 29 U.S.C. § 653(b)(4), the use of OSHA standards to alter the civil rule of liability is prohibited. Minichello v. U.S. Industries, Inc., 756 F.2d 26, 30 (6th Cir. 1985). No such law limits the use of Coast Guard regulations. As a result, cases involving violations of Coast Guard regulations do not support the contention that the violation of an OSHA regulation bars contributory

negligence under FELA.[13] The Third Circuit failed to distinguish between the cases like Kernan which involved violations of Coast Guard regulations and the instant case which the court itself found involved an OSHA regulation.

Simply stated, no Coast Guard regulation relevant to Watterson's accident applied to the working conditions at issue in the instant case, and accordingly, no Coast Guard

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[13]Even in cases where a statutory violation of a Coast Guard regulation has been found, despite the broad language of Kernan, the Fifth Circuit has been reluctant to find the violation bars contributory negligence on the part of the plaintiff. For example, in Smith, cited above, a violation of a Coast Guard regulation was found. The Fifth Circuit reversed the district court for failing to have granted a directed verdict for the plaintiff on the Jones Act negligence claims. However, the case was remanded to determine, among other things, the extent of contributory negligence by the plaintiff. Smith establishes that despite a violation of even a Coast Guard regulation, a seaman can still be held to have been contributorily negligent.

regulation could have been violated. Because this crucial element has not been met, negligence per se in this Jones Act case does not apply.

B. OSHA IS NOT A SAFETY STATUTE UNDER FELA AND A VIOLATION OF AN O S H A REGULATION DOES NOT CONSTITUTE NEGLIGENCE PER SE TO BAR CONTRIBUTORY NEGLIGENCE

Initially, in his appeal, Watterson claimed it was a Coast Guard regulation which had been violated. Upon realizing that the Coast Guard regulations did not apply, Watterson claimed that an OSHA regulation had been violated and that the violation was sufficient to constitute negligence per se to bar contributory negligence. That argument, however, has been rejected by the majority of the federal appellate courts as well as this Court in cases arising under state law.

1. Majority View

The majority view, which is set forth in Ries v. National R.R. Passenger

Corp., 960 F.2d 1156 (3d Cir. 1992), is that OSHA is not a safety statute under FELA, and that a violation of an OSHA statute does not constitute negligence per se to bar contributory negligence pursuant to 45 U.S.C. §53 of FELA. The Ries decision is supported by decisions of the Fourth and Sixth Circuits.[14] Moreover, Ries was also recently followed by the Ninth Circuit in Robertson v.Burlington Northern Railroad Company,

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[14] See, for example, Albrecht v Baltimore v Ohio R. Co., 808 F.2d 329, 332-33 (4th Cir. 1987) (OSHA violation did not constitute negligence per se); Minichello v U.S. Industries, Inc., 756 F.2d 26, 29 (6th Cir. 1985) (in product liability cases, "OSHA regulations can never provide a basis for liability because Congress has specified that they should not"). See also Bachini v Burlington Northern R.R. Co., No. CV-87-248-GF, 1990 WL 359076 (D. Mont., March 7, 1990); Berthlof v Burlington Northern R.R., 402 F. Supp. 171, 173 (E.D. Wash. 1975); Hebel v Conrail, 475 N.E. 2d 652 (Ind. 1985); Wendland v Ridgefield Constr. Services, Inc., 184 Conn. 173, 439 A. 2d 954 (1981) (all finding OSHA violation not to be negligence per se under the FELA).

32 F.3d 408, (9th Cir. 1994), as well as in state court cases in other jurisdictions.[15]

The Ries court found that OSHA is not the type of "safety statute" which would give rise to negligence per se and bar contributory negligence under 45 U.S.C. §53. In reaching this conclusion, Ries distinguished OSHA from safety statutes specifically aimed at the railroad industry, such as the Safety Appliance, Boiler Inspection, and Hours of Service Acts. The court observed:

> Railroad safety statutes such as the Safety Appliance and

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[15]See, for example, Canape v. Colorado Compensation Insurance Authority, 878 P.2d 83 (Colorado Ct. Apps. 1994)("29 U.S.C. § 653(b)(4) precludes an instruction of negligence per se"); Brady v. Ralph M. Parsons Company, 327 Md 275, 609 A.2d 297 (Ct. of Apps. Md. 1992)(proof of violation of an OSHA standard, although admissible, does not establish negligence per se or preclude consideration of plaintiff's contributory negligence).

> Boiler Inspection Acts do not occupy the same position *vis a vis* the FELA as does OSHA . . . Indeed, the Supreme Court has held that these two railroad safety statutes "are substantively if not in fact *amendments* to the Federal Employers' Liability Act." [citations omitted]. The same cannot be said about OSHA. Furthermore, the Safety Appliance, Boiler Inspection and Hours of Service acts are all phrased in terms of "it shall be unlawful," which is the usual phrasing of a statute establishing negligence per se. [citation omitted]. OSHA lacks this important wording.

Ries, 960 F.2d at 1156.

Further, as the court explained:

> Congress has established an elaborate system of administrative civil and criminal penalties for punishing OSHA violations in 29 U.S.C. §666 . . . Indeed, the purpose of OSHA is preventive rather than compensatory. B&B Insulation, Inc. v. Occupation Safety & Health Review Comm'n, 583 F.2d 1364, 1370-71 (5th Cir. 1978) . . . . . For this court to allow an OSHA violation to serve as the basis for a negligence per se suit under the FELA would create an implied private cause of action, and thus upset the

> congressional scheme for enforcing workplace safety through administrative penalties. We cannot say that the legislatively created sanctions for OSHA violations are insufficient and require judicial supplementation nor can we say that any useful purpose related to congressional policy goals would be served by tacking on yet another enforcement vehicle. [citation omitted].

Ries, 960 F.2d at 1164.

Like the regulations relied on by the plaintiff in Ries, the scaffolding regulations relied on by Watterson in this case are merely general workplace regulations, not specifically aimed at the maritime industry. As in Ries, the OSHA regulations relied on by Watterson are not the type of "safety statute" giving rise to the bar of contributory negligence under 45 U.S.C. § 53.[16]

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[16] As noted by the Ries court at page 1163, "Imposing negligence per se for all statutory violations would be quite draconian, and we doubt that Congress intended to punish railroad employers so

As indicated in Ries, a violation of an OSHA regulation does not constitute negligence per se because Congress has mandated in 29 U.S.C. 653(b)(4) that OSHA shall not:

> . . . enlarge, diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of, employment.

Ries, 960 F.2d at 1162. If a violation of an OSHA regulation could constitute negligence per se and bar contributory negligence under the FELA, it would be almost axiomatic that the effect would be to "enlarge or diminish or affect the statutory duty or liability of the employer." Ries, 960 F.2d at p. 1162.

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severely when it enacted the FELA." Mallard submits imposing absolute liability on maritime employers for violations of such general workplace violations would be equally oppressive.

2. Minority View

However, in this case, the Third Circuit rejected the holding in Ries, and instead opted to follow Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985), the only case offered by Watterson holding that the violation of an OSHA statute in a FELA case constitutes negligence per se. The reasoning of the court in Pratico has been described as defying "traditional principles of statutory interpretation which dictate that courts first look at the statute's language and the plain meaning of that language." Ries, 960 F.2d at p. 1161. As the Ries court concluded, Pratico's holding that an OSHA violation constitutes negligence per se and bars contributory negligence under FELA was based on that court's conclusion, triggered by an overly restrictive interpretation of a single

letter by the then-solicitor of labor, that the only purpose of the "enlarge or diminish or affect" language of section 653(b)(4) was to ensure that OSHA did not create a private cause of action which would bypass workers' compensation. As stated in Ries:

> It defies reason to construe section 653(b)(4) as only precluding private actions which would bypass workers' compensation. Had Congress intended such a result, it would not have drafted section 653(b)(4) in such sweeping terms.

Ries, 960 F.2d at p. 1162. Mallard respectfully submits the Ries court's analysis is the proper view.

The Pratico court cited several earlier Fifth Circuit opinions, Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1981); Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231 (5th Cir. 1982); Melerine v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1981); and

Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980), for the proposition that the "Fifth Circuit . . . has consistently found § 653(b)(4) no obstacle applying the doctrine of negligence per se to OSHA violations." Pratico, 783 F.2d at 264-265. However, these cases do not support that conclusion.

Neither Dixon nor Rabon are Jones Act or FELA cases, but instead are diversity actions.[17] In fact, Dixon simply held that admitting OSHA standards, even if erroneous, was harmless because the evidence was only cumulative. Likewise, Lowe was not a Jones Act or FELA case, but rather a diversity suit applying Alabama law. Further, the case did not even involve an

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[17]Dixon arose under Mississippi law, while Rabon was brought under Florida law.

OSHA statute, but rather a federal motor vehicle statute.[18]

Similarly, Melerine is not a Jones Act case, but instead arose under general maritime law, and in no fashion supports the Pratico court's holding. Importantly, Judge Rubin opened his opinion in Melerine with the following statement:

> In a negligence action, regulations promulgated under the [OSHA] provide evidence of the standard of care exacted of employers, but they neither create an implied cause of action **nor establish negligence per se**. [Emphasis added]

Melerine, 659 F.2d at 707. Obviously, Melerine contradicts, rather than supports, the holding in Pratico.

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[18]Pratico cited Lowe for the obvious proposition that admitting a federal statute as evidence of a standard of care in a state law case does not create a new cause of action. However, like Dixon and Rabon, Lowe does not support Pratico's holding that a violation of OSHA constitutes negligence per se to bar contributory negligence.

Finally, in Rabon, while specifically declining to decide whether the alleged violation of an OSHA regulation constituted negligence per se, in dicta, the court stated that "the violation of an OSHA regulation is evidence of negligence, or in appropriate cases negligence per se." Rabon, 672 F.2d at 1238. The court cited Melerine, National Marine Services, Inc. v. Gulf Oil Co., 433 F. Supp. 913 , 919-920 (E.D. La. 1977), aff'd 608 F.2d 522 (5th Cir. 1979), and Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974) for this proposition. The latter part of this statement represents an erroneous reading of the cases relied on by the Rabon court. It contradicts Judge Rubin's specific statement on the issue in Melerine. Moreover, neither National Marine Services, Inc. nor Buhler held that a violation of OSHA constitutes

negligence per se. Both cases simply held that OSHA regulations may, in appropriate cases, be considered as guides for determining standards of care in weighing a defendant's negligence, a view which Mallard does not dispute. Unfortunately, the Pratico court compounded the error by relying on the dicta from Rabon.

As noted in Pratico, "[T]he legislative history of [FELA] Section 53 indicates that Congress considered this elimination of contributory negligence to simply be a reflection of the common law doctrine of negligence per se . . ." Pratico, 783 F.2d at 268. However, eliminating contributory negligence in the instant case based on the violation of an OSHA regulation does not reflect general maritime law or Louisiana state law. As Judge Rubin indicated in Melerine, under general maritime law,

OSHA regulations do not establish negligence per se. Likewise, it has long been clear that under Louisiana state law, the violation of an OSHA regulation regarding crane safety does not constitute negligence per se. Dyson v. Gulf Modular Corp., 338 So. 2d 1385 (La. 1976). The United States Fifth Circuit Court of Appeals recently followed Dyson in Dupre v. Chevron U.S.A., Inc., 20 F.3d 154, 157 (5th Cir. 1994). Applying Louisiana law, the Fifth Circuit held that violations of the "plethora" of regulations affecting stationary offshore platforms did not constitute negligence per se. Melerine, Dyson, and Dupre directly support Mallard's position.

In light of the foregoing, the Third Circuit's reliance on Pratico is misplaced. The holding of Ries represents the better-reasoned view. Not only does 29 U.S.C. § 693(b)(4) prohibit

OSHA from being used to create new, private causes of action, it bars the use of the statute to enlarge or affect the rights of employees and the duties of employers under any law. As the Ries court stated, if a violation of an OSHA regulation could constitute negligence per se and bar contributory negligence under FELA, its effect would be to "enlarge or affect the statutory duty or liability of the employer." Ries, 960 F.2d at p. 1162. The view followed by the Third Circuit violates 29 U.S.C. § 653(b)(4).

3. Plaintiff's Preemption Argument

Mallard anticipates that, as he did in the appellate court below, Watterson will attempt to diminish the holdings in Ries and Robertson by contending that they held that a violation of OSHA is not sufficient to constitute negligence per

se because the Federal Railroad Association ("FRA") has preempted OSHA in matters of

safety.[19] This is not correct. The Ries court specifically found that OSHA had jurisdiction with regard to the stairway which was at issue, and that the violation could serve as the basis for administrative penalties against the defendant, Amtrak. Further, the court even allowed evidence of the violation to be admissible as evidence of Amtrak's negligence. However, in holding that an OSHA violation did not constitute negligence per se, the Ries court did not

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[19]As noted above, in Robertson, the Ninth Circuit recently followed Ries, rather than Pratico, and held an OSHA violation does not constitute negligence per se. Like Ries, Robertson held that although OSHA standards may be admitted in a FELA case as evidence of the applicable standard of care, such evidence is to be considered only in relation to all other evidence in the case.

do so because of preemption by the FRA. Instead, as previously stated, the Ries holding was based on the determination that OSHA is not a safety statute for purposes of FELA, and Congress has mandated in 29 U.S.C. § 653(b)(4) that OSHA standards are not to be used to alter the rule of civil liability of employers.

The fallacy of the preemption argument is further demonstrated by Watterson's reliance, in his argument to the appellate court, on Templeton v. Chicago and Northwestern Transportation Co., 603 N.E. 2d 441 (Il. Sup. Ct. 1992). The Illinois Supreme Court specifically held that OSHA had not been preempted by the FRA. After this holding by the Illinois Supreme Court, on remand, the appellate court affirmed the trial court's judgment assigning 14% contributory negligence to the plaintiff.

Templeton v. Chicago and Northwestern Transportation Company, 257 Ill. App. 3d 42, 628 N.E. 2d 442 (Il. 1993). Thus, Templeton demonstrates that whether or not OSHA has been preempted by the FRA has nothing to do with the majority view that a violation of an OSHA regulation does not amount to negligence per se.

In sum, the Third Circuit erroneously expanded the negligence per se doctrine to hold that a violation of OSHA bars contributory negligence under 45 U.S.C. § 53. Negligence per se is not applicable because there was no violation of a Coast Guard regulation, and the violation of an OSHA regulation (assuming somehow there was a violation) is not sufficient to constitute negligence per se. Mallard requests that the Court adopt the majority view as espoused in Ries and reverse the appellate court's assignment of 100% fault to Mallard.

ISSUE NO. 2

The trial court awarded, and the appellate court affirmed, somewhat arbitrarily, pre-judgment interest on the entire judgment. Although the lower courts had the discretion to award pre-judgment interest, pre-judgment interest can only be awarded on past damages. Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1435 (5th Cir. 1988); Reeled Tubing, Inc. v. M/V CHAD G, 794 F.2d 1026 (5th Cir. 1986); Martin v. Walk, Haydel & Associates, 794 F.2d 209, 212 (5th Cir. 1986); and Wyatt v. Penrod Drilling Co., 735 F.2d 951 (5th Cir. 1984). An award of pre-judgement interest on future damages is not proper. The award by the lower court of pre-judgment interest on items of future damages should be reversed.

VII. CONCLUSION

This accident occurred because Watterson knowingly chose to take a risky shortcut. Rather than get off of the scaffold the same way he got on, Watterson attempted to jump down onto a ladder. He knew that the ladder was not there for that purpose and he knew that his maneuver was dangerous. On that evidence, the trial court allocated 85% of the fault for his injuries to Watterson.

In reversing the trial court, the Third Circuit followed the minority (and less reasoned) holding of Pratico. This result violates 29 U.S.C. § 653(b)(4). Mallard requests that this court enforce Congress' requirement that an OSHA violation not be used to "enlarge, diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and

employees." Accordingly, the decision of the Third Circuit should be vacated.

Finally, the trial court awarded, and the appellate court affirmed, pre-judgment interest on the entire judgment. The award of pre-judgment interest on future damages is not proper and should be reversed.

Mallard respectfully requests the Court to grant this application and (i) vacate the appellate court's modification of the trial court's judgment to assess 100% fault to Mallard, and (ii) reverse the award by the lower courts of pre-judgment interest on items of future damages.

Respectfully submitted,

PERRET, DOISE, DAIGLE, LONGMAN
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VERIFICATION

STATE OF LOUISIANA

PARISH OF LAFAYETTE

JOHN B. WARTELLE, BEING SWORN SAYS:

1. I am the attorney for Defendants-Applicants, Mallard Bay Drilling, Inc. and Certain Underwriters at Lloyd's, London. I make this Verification in support of Mallard Bay Drilling, Inc. and Certain Underwriters at Lloyd's, London's Application for Writ of Certiorari and Review.

2. I have read the allegations contained in the Application and I certify that those allegations are true to the best of my knowledge, information and belief.

3. I further certify that a copy of Mallard Bay Drilling, Inc. and Certain Underwriters at Lloyd's, London's Application for Writ of Certiorari and Review has been mailed or delivered to the appropriate court of appeal, as well as to all other counsel and/or unrepresented parties involved in this action, whose names, addresses and telephone numbers

and the parties represented are listed hereinbelow.

/s/ John B. Wartelle
JOHN B. WARTELLE

SWORN TO AND SUBSCRIBED BEFORE ME this 9 day of November, 1994.

/s/ Marilyn C. Castle
NOTARY PUBLIC

Aubry Watterson
through his counsel of record
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Third Circuit Court of Appeal
1000 Main Street
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THE SUPREME COURT OF
THE STATE OF LOUISIANA

AUBRY WATTERSON, ET AL

VS. NO. 94-C-2769

MALLARD BAY DRILLING, INC.,
ET AL

IN RE: Mallard Bay Drilling Inc.; Certain Underwrt. Lloyd London; Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA93-1494; Parish of Iberia, 16th Judicial District Div. "B" Number 72865

January 27, 1995

Denied.

CDK
PFC
JLD
JCW
HTL

MARCUS, J. would grant the writ.

JOHNSON, J. not on panel.

VICTORY, J. would grant the writ.

Supreme Court of Louisiana
January 27, 1995

/s/ Frans J. Lebranche, Jr.

Clerk of Court
For the Court

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

February 3, 1995

John Bradley Wartelle Esq.
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Lafayette, LA 70502

In Re: Watterson, Aubrey et al
vs. Mallard Bay Drilling Inc.
et al

Dear Counsel:

This is to advise that the Court took the following action on February 2, 1995 with regards to the above entitled matter:

> "Considering the foregoing motion, defendant, Mallard Bay Drilling, Inc. and certain underwriters at Lloyd's, London are granted a stay of the execution of the judgment against them conditioned upon their timely filing an application for certiorari to the United States Supreme Court."

With kindest regards, I remain

Very truly yours,

Frans J. Labranche, Jr.
Clerk of Court

/s/ John Tarlton Oliver
By: John Tarlton Olivier
Deputy Clerk of Court

JTO/rtd
ccs: Fred H. Belcher Jr. Esq.
Edward B. Kramer Esq.
Douglas C. Longman Jr. Esq.

Court of Appeal, Third Circuit, Number CA93-1494
16th Judicial District Div. "B" Number 72865

Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1743

In The

Supreme Court of the United States

October Term, 1994

MALLARD BAY DRILLING, INC., AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Petitioners,

versus

AUBRY AND MARTY WATTERSON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, Louisiana Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the decision of the Louisiana Third Circuit and writ denial of the Louisiana State Supreme Court consistent with the Jones Act, 46 U.S.C. § 688 et seq.?

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No. 94-1743

In The

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October Term, 1994

MALLARD BAY DRILLING, INC., AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Petitioners,

versus

AUBRY AND MARTY WATTERSON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, Louisiana Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

This case was brought in Louisiana State Court pursuant to the Jones Act. After trial, final judgment was entered and Watterson appealed to the Louisiana Third Circuit Court of Appeal.

After hearings of both a three-judge panel, and a five-judge panel, the Third Circuit modified the award, and affirmed. *Watterson v. Mallard-Bay et al.*, 649 So.2d 431 (1994). The Louisiana State Supreme Court denied Petitioner's Writ of Certiorari. *Watterson v. Mallard-Bay et al.*, 650 So.2d 241 (1995).

STATUTE INVOLVED

The statute in issue is 46 U.S.C. § 688 et seq. (The Jones Act).

STATEMENT OF FACTS

Aubry Watterson, 27 years old, was employed by Mallard Bay Drilling, Inc. as a floorhand, and a member of the crew of the vessel MALLARD-BAY INLAND BARGE #27. On October 23, 1990, Watterson was working aboard the vessel as a floorhand.

Watterson was instructed by the driller, to "begin chipping and painting in the keyway" two decks below, on a scaffold ten feet above the floor. Watterson and another crewmember reached the area in which they were to work. Watterson noticed water on the scaffold, and went to get rags to absorb the water.

As Watterson attempted to climb down the ladder, the scaffolding shifted, causing the ladder to fall from under Watterson, and Watterson fell 10-12 feet and was injured. Watterson had substantial medical treatment including two separate fusion surgeries at L4-5, and two hospitalizations. It is undisputed that the accident caused the injuries.

REASONS FOR DENYING THE PETITION

The petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. This case involves no conflict amongst

the Federal Circuit Courts, the decision is in accord with Supreme Court precedent, and presents no conflict of any law. Further the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.[1]

The petition for Certiorari fails to cite any Jones Act cases opposing, or even differing from, the conclusion in the case at bar. Rather, it focuses on FELA (railroad) cases that have no applicability to the issue in this Jones Act case.

I. REGULATIONS

Under the Jones Act, a seaman may recover damages from his employer for his employer's negligence. If a violation of "any statute enacted for the safety of employees contributed to the injury or death of such employee," then contributory negligence may not be considered. 45 U.S.C. § 53.

There is no dispute regarding the applicability of 45 U.S.C. § 53 to the plaintiff, a Jones Act seaman. *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1957).

Respondent's expert established, without contradiction, that the Coast Guard, OSHA, and ANSI regulations are all potentially applicable to this uninspected vessel,

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[1] The United States Coast Guard, Merchant Vessel Inspection Department, Washington, D.C., is also developing specific regulations for this industry which, like the FRA, would supplant OSHA authority, thereby mooting the issue in this case.

but, in any case, the regulations are **identical**. The regulations[2] violated require, *inter alia*, that the scaffold be "secured from movement." Petitioner called no expert.

OSHA, *with consent of the Coast Guard*, is the primary regulator of uninspected vessels. *In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *reh'g and reh'g en banc denied*, 790 F.2d 88 (1986) *cert. denied*, 479 U.S. 883, 107 S.Ct. 271, 93 L.Ed.2d 248 (1987).

The court found that "the scaffolding *did move* when Watterson attempted to get down from the scaffolding onto the ladder, and that this was caused by *a failure to properly secure the scaffolding*," which was a "cause in fact" of the plaintiff's injury. Hence, a violation of Coast Guard, OSHA, and ANSI regulations.

Accordingly, the Appellate Courts applied 45 U.S.C. § 53 to bar contributory negligence.

Petitioner bases its entire brief on the same argument that it attempted in front of the Third Circuit. That is, it is

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[2] Specifically, the regulations require that scaffolds more than ten feet off the ground (1) be lashed so as to make one component immobile with respect to the others; (2) be totally enclosed with guardrails; and (3) that the top plate of ladder extend above the scaffold, and be lashed to it. ANSI 4.1, 4.5, 4.5.2, 4.5.9, 4.15, 4.18; OSHA 39 C.F.R. § 1910.28 Safety Requirements for Scaffolds, (a)(1)-(27); ANSI 8.1-8.3.21. The Coast Guard regulations provide that these standards are "incorporated by reference." This incorporation is to save printing space, but this material, like any other properly issued regulation, has the force of law. 5 U.S.C. 552(a); *"Incorporation by Reference,"* October 1, 1990 Martha L. Girard, Director, Office of the *Federal Register.*

not subject to any regulation. The absurd result of petitioner's argument would allow violations of **identical** regulations, despite passage by two separate agencies, OSHA and the Coast Guard.

Petitioner fails to mention that even in its own annual report, introduced at trial, it declares that "[t]he company is also subject to various safety and health regulations as established by the Occupational Safety and Health Administration. (OSHA)."

II. JONES ACT DIFFERS FROM FELA

Petitioner's application fails to separate the distinctions between regulation of the *railroad* industry (FELA) and the *shipping* industry. (Jones Act)

Petitioner's brief only cites cases that involve the application of OSHA to *FELA* claims, not *Jones Act* claims; and it ignores the fact that while the FRA regulates railroads, OSHA regulates uninspected vessels, *with the consent of the Coast Guard.*

Petitioner cannot cite any cases under the *Jones Act* that support its position. It relies solely upon railroad cases. The regulation of the rail industry is materially different from the shipping industry. These FELA cases are not germane to the issue at bar.

The incorporation of FELA principles by the Jones Act is not to be "applied mechanically to the specific facts of maritime events" but rather "interpreted in harmony with the established doctrine of maritime law of which it is an integral part," especially when FELA contains no "definite command" on a given subject. *Cox v. Ruth*, 75

S.Ct. 242, 348 U.S. 207, 99 L.Ed. 260 (1954); *The Arizona v. Anelich*, 298 U.S. 110, 120, 123, 56 S.Ct. 707, 80 L.Ed. 1075 (1936).

A. Petitioner's Argument Falls

Petitioner's argument was properly rejected by the Appellate courts for several reasons.

Petitioner disingenuously argues that two railroad cases, *Reis v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992), and *Robertson v. Burlington Northern Railroad Company*, 32 F.3d 408 (9th Cir. 1994), are controlling as to this Jones Act case.

This is simply not true. Although *Reis* and *Robertson* hold OSHA does not provide negligence per se in a *railroad* case, this is not to say that OSHA does not provide negligence per se in a *Jones Act* case.

A proper reading of these cases reveal that, in a railroad setting, the Federal Railroad Administration "FRA," not OSHA, is the primary regulator. The FRA has displaced OSHA regulations in the rail industry. "The FRA has issued a statement indicating which aspects of railroad industry fall under exclusive jurisdiction of the FRA, thereby displacing applicable OSHA regulations." *Velasquez v. Southern Pacific Transportation Company*, 734 F.2d 216 (5th Cir. 1984); *Southern Pac. Trans. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874, 98 S.Ct. 222, 54 L.Ed.2d 154 (1977).

Even in *Reis, supra*, the court acknowledges that OSHA may provide the basis of negligence per se in

industries other than the rail industry, by affirming this jury instruction:

> Evidence has been introduced in this case on the subject of Occupational Safety and Health Administration (OSHA) standards, ... *These standards are binding on certain industries in the United States. In those industries as to which the standards are binding, a violation of the standards, standing alone, constitutes negligence as a matter of law.* These standards are not binding on defendant Burlington Northern in this lawsuit. *(emphasis supplied).*

If this were a FELA (railroad) case, then it would be the FRA, and not OSHA that forms negligence per se. However, in the inland barge industry OSHA regulations (with Coast Guard consent) are binding, and apply to 45 U.S.C. § 53.

Accordingly, the decision of the courts below is proper in all respects and the writ application should be denied.

B. No Circuit Conflict

Petitioner incorrectly urges that there is a conflict amongst the circuit courts regarding negligence per se in Jones Act cases. Yet petitioner fails to cite any Jones Act cases that are contrary to the holding in this case.

Despite petitioner's claims, courts have found § 653(b)(4) no obstacle to applying the doctrine of negligence per se to OSHA violations. *Dixon v. International Harvester*, 754 F.2d 573 (5th Cir. 1985); *Rabon v. Automatic*

Fastners, 672 F.2d 1231 (5th Cir. 1982); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981).

These cases distinguish between the use of regulations as a standard of care, and the derivation of a private right of action from the regulations themselves. *Pratico v. Portland Terminal Co.*, 783 F.2d 255 at 264 (1st Cir. 1985). These Federal Circuit cases are exceedingly clear on the point that OSHA may constitute negligence per se in the industries to which they are binding.

In *Rabon, supra*, the court correctly stated:

> Although OSHA creates no private right of action, a violation of an OSHA regulation is evidence of negligence, or in appropriate circumstances, negligence per se. 672 F.2d at 1238. (citations omitted)

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Given the unique nature of this case, the remedial nature of the Jones Act, and the identical regulations of the Coast Guard and OSHA, there is no issue or conflict regarding the holding of the lower courts.

Petitioner's writs application should be denied.

III. AWARD OF PRE-JUDGMENT INTEREST IS CORRECT

In a Jones Act suit brought under the court's admiralty jurisdiction the award of prejudgment interest lies within the sound discretion of the trial judge. *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985).

In maritime cases, prejudgment interest is ordinarily awarded from the date of loss. *Reeled Tubing, Inc. v. M/V CHAD G.*, 794 F.2d 1026 (5th Cir. 1986).

The Louisiana Third Circuit found that, like the trial court, "the result is fair and certainly not an abuse of the trial court's discretion." Trial courts are, in Jones Act cases, vested with a great deal of discretion.

Clearly, petitioner has not articulated any compelling reasons to modify this award.

IV. CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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